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No. 87-996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE,
Petitioner,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
AS RECEIVER OF FIRSTSOUTH, F.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Has Congress granted FSLIC, as receiver, the exclusive authority to adjudicate the validity of state law causes of action asserted against failed savings and loan associations under a FSLIC receivership?

II. If Congress did give FSLIC authority to adjudicate state law causes of action asserted against failed savings and loan associations under a FSLIC receivership, would that grant of authority violate the mandate of separation of powers in Article III, § 1 of the U.S. Constitution?

III. Would requiring Petitioner to submit its claims against FirstSouth to FSLIC for adjudication deny Petitioner due process of law under the Fifth Amendment to the U.S. Constitution?

IV. Would requiring Petitioner to submit its claims against FirstSouth to FSLIC for adjudication deprive Petitioner of its right to a jury trial under the Seventh Amendment to the U.S. Constitution?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Fifth Circuit is reported at 829 F.2d 563 (5th Cir. 1987). The opinion ("Order") of the U.S. District Court has not been reported, and is reprinted in the appendix to the Petition for Certiorari. (P.A. 5-6).[1]

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[1] Citations to the appendix to the Petition for Certiorari will be in the form of "P.A. ___"; to the Joint Appendix, "J.A. ___"; to the record, "R. ___"; and to the appendix to this Brief, "B.A. ___"

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1987. (P.A. 8). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution

Article III, Section 1 of the United States Constitution
The Fifth Amendment to the United States Constitution
The Seventh Amendment to the United States Constitution

Statutes

12 U.S.C. § 1464(d)(6)(C)
12 U.S.C. § 1728(c)
12 U.S.C. § 1729(c)
12 U.S.C. § 1729(d)
12 U.S.C. § 1730(k)(1)

Regulations

12 C.F.R. § 549.4
12 C.F.R. § 569a.8

The text of the foregoing provisions, statutes and regulations is reprinted in the appendix hereto. (B.A. 41-46).

STATEMENT OF THE CASE

A. Statement of Facts

From 1983 to 1986, Petitioner, Coit Independence Joint Venture ("Petitioner" or "Coit") received loans from FirstSouth, F.A., a federal savings association ("FirstSouth") on two parcels of land, the Rasor Tract and the Frankford

Property.[2] Because Coit advised FirstSouth that it had a contract to resell the Rasor Tract for a $10 million profit, FirstSouth demanded from Coit, as a condition to making the $20 million dollar loan, both interest at the treasury bill rate plus 4.25% and a "profit participation interest." Coit agreed to these demands, and when the Rasor Tract was sold, repaid FirstSouth approximately $23 million, including a $2.2 million participation profit on a loan that was outstanding for only 72 days. Coit claimed in its petition filed in state court that the profit participation interest and other commitment and origination fees were in reality compensation for the use of money and therefore constituted usury under Texas law. Because the rate of interest charged was more than twice the amount permitted under Texas law, Coit sued for the return of the principal amount of the loan and for three times the amount of usurious interest charged.

Coit also received a loan on the Frankford property in the amount of approximately $30 million. In connection with this loan, FirstSouth contracted to receive, in addition to interest, a 25% "profit participation interest" in the Frankford property. FirstSouth also agreed to continue to renew the note for at least five years unless the property was sold prior to that time, and agreed to allow Coit to draw down funds to improve the property. In August of 1986, FirstSouth refused to renew the notes as it had promised, demanded payment of the notes, and threatened to foreclose on the property. In Count I of its state court petition, Coit sued for forfeiture of the principal and penalty damages for usury in connection with both the Rasor Tract and the Frankford property. In

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[2] Because this case involves the propriety of the district court's dismissal of Coit's state court claims after their removal to federal court, the facts discussed herein are derived from Coit's state court petition (J.A. 16-24) and not from any evidence presented in the courts below.

Count II of its petition, Coit alleged that FirstSouth was in reality Coit's partner with regard to the properties, and that its failure to provide capital and to deal with Coit in a fair manner constituted breaches of its fiduciary duty and its duty of good faith and fair dealing which damaged Coit in an amount in excess of the court's minimum jurisdictional limits. Coit also prayed for a declaratory judgment that any note, deed of trust, guaranty or other document in connection with the loan was unenforceable. (J.A. 16-24).

B. Proceedings in the Courts Below

On or about December 4, 1986, the Federal Home Loan Bank Board (the "Board" or "FHLBB") appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") receiver for FirstSouth pursuant to 12 U.S.C. § 1464(d)(6)(A) and 12 U.S.C. § 1464(d)(6)(B)(i), on the ground, *inter alia*, that FirstSouth's liabilities exceeded its assets. (J.A. 7-15). On December 31, 1986, FSLIC removed Petitioner's state court action to the United States District Court for the Northern District of Texas, pursuant to 12 U.S.C. § 1730(k)(1)(C) and 28 U.S.C. § 1441. (J.A. 3-7). The United States District Court had original jurisdiction of this action under 12 U.S.C. §1730(k)(1)(c) and 28 U.S.C. §§ 1331 and 1346.

On February 19, 1987, FSLIC moved the United States District Court to dismiss Petitioner's complaint, arguing that FSLIC had exclusive jurisdiction to adjudicate any and all causes of action against FirstSouth. (J.A. 27-29). FSLIC insisted that the federal district court had no jurisdiction to hear claims brought against FirstSouth, but that the sole recourse of a would-be litigant against an insolvent savings and loan association under a FSLIC receivership was to take its claim to FSLIC for initial adjudication, then to appeal that decision to the Board, and finally to appeal the Board's

decision to the federal courts pursuant to the appeal procedures dictated by the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (the "APA"). The district court granted FSLIC's motion to dismiss and entered an order on February 25, 1987, dismissing Petitioner's action. (J.A. 30-31). Thereafter, Petitioner filed a motion to reconsider (J.A. 32-36); such motion was denied by order of the district court dated April 9, 1987. (J.A. 45-46). Petitioner appealed from these orders under 28 U.S.C. § 1291 to the United States Court of Appeals for the Fifth Circuit. (J.A. 37-38; 47-48). The court of appeals affirmed the dismissal by the district court after denying Petitioner's request for an initial hearing *en banc*.

In its appeal, Petitioner argued that the Fifth Circuit's prior decision in *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986) ("Hudspeth") was erroneous in its conclusion that certain statutes and regulations governing the authority of FSLIC to act as receiver granted FSLIC exclusive jurisdiction over all claims against a failed savings and loan association. Petitioner also claimed that FSLIC's asserted jurisdiction was unconstitutional. The court of appeals summarily determined that it was bound by its prior decision in *Hudspeth*, and that Petitioner's constitutional claims were not ripe for resolution at this time. Petitioner thereafter filed a Motion to Recall Mandate and to Enlarge Time to Petition for Rehearing or Rehearing En Banc, which the court of appeals denied on February 8, 1988. (J.A. 49). On March 7, 1988, this Court granted a writ of certiorari in this case. (J.A. 50).

C. Subsequent Developments

On September 28, 1987, two weeks before the court of appeals issued its opinion in this case, Petitioner filed its proof of claim with FSLIC in order to meet a deadline that FSLIC had imposed for the filing of creditor claims against

FirstSouth. (B.A. 1-11). The claim was filed under protest "without waiving [Coit's] rights to have this case tried before a jury in federal district court." (B.A. 8). Six months later, FSLIC notified Petitioner that its proof of claim had been received and had been "retained for further review." (B.A. 12-13).

On October 9, 1987, ten days after Coit filed its proof of claim with FSLIC, FSLIC notified Coit that it was accelerating all indebtedness due FirstSouth and foreclosing on the Frankford Property (B.A. 15-26). Because judicial protection against foreclosure was unavailable under the *Hudspeth* doctrine,[3] Coit filed a Request for Expedited Relief with the Board seeking a stay of the foreclosure (B.A. 27-31). In response, FSLIC filed a motion to dismiss Coit's claim for expedited relief on the grounds that the notice of foreclosure had been withdrawn and the request for relief was therefore premature (B.A. 32-34). In its letter withdrawing the notice of foreclosure, the Substitute Trustee under the deed of trust, acting under instructions from FSLIC, "reserve[d] the right to repost the property for foreclosure." (B.A. 35). The Motion for Expedited Relief was thereafter dismissed without prejudice. (B.A. 38-39). As of May 5, 1988, no further proceedings have occurred in this case before FSLIC or the Board.

SUMMARY OF ARGUMENT

In an unprecedented bid for judicial power, FSLIC has asserted that all claims of whatever kind or amount brought against a savings and loan association under a FSLIC receivership must be adjudicated in a proceeding before FSLIC,

[3] *See FSLIC v. Hall Whispertree Associates*, 653 F. Supp. 148 (W.D. Tex. 1986).

instead of in a court of law. Yet the statutes and regulations upon which FSLIC relies for this extraordinary claim nowhere explicitly grant FSLIC adjudicatory power, nor is FSLIC empowered to create administrative tribunals for this purpose. Rather, the Fifth Circuit has inferred this authority from a few scattered words and phrases in statutes describing FSLIC's powers as receiver, even though those statutes can be read in a manner that would avoid the wholesale usurpation by FSLIC of large areas of federal and state court jurisdiction. The Fifth Circuit's interpretation of FSLIC's authority also ignores important decisions from this Court which provide valuable insights into the meaning of those statutes. Specifically, the statutory prohibition against actions by a court which would "restrain or affect" the functions or duties of a receiver, upon which FSLIC primarily relies, must be read in light of the common law. Under the common law, *in personam* actions for damages, like the one in this case, were allowed to proceed in courts other than the receivership court despite claims that they interfered with the receiver. *Morris v. Jones*, 329 U.S. 545 (1946); *Riehle v. Margolies*, 279 U.S. 218 (1928).

However, even if Congress could be said to have granted FSLIC the exclusive power to adjudicate creditor claims, the grant of such adjudicatory powers would create serious constitutional problems which are ripe for adjudication at this time. First, FSLIC's assertion of jurisdiction over all claims against failed savings and loan associations violates the mandate of separation of powers in Article III, § 1 of the U.S. Constitution contrary to this Court's opinion in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). By ousting the district courts of jurisdiction, and providing for only limited judicial review over FSLIC's decisions, the statutes as construed effectively withdraw from the

judicial province a wide range of claims that have historically been at the core of judicial power.

Secondly, requiring Coit to present its claims to FSLIC for determination would deny Coit due process under the Fifth Amendment to the U.S. Constitution. FSLIC as the single largest claimant of FirstSouth's assets, and as a litigant with substantial monetary claims against Coit, has a financial interest in minimizing or denying Coit's claims, and is therefore not an impartial, disinterested tribunal with respect to such claims. *See Ward v. Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927).

Finally, Coit is entitled to a jury trial on its claims in this action. Requiring it to have its claims determined by FSLIC in an agency proceeding would deprive it of its right to a jury trial under the Seventh Amendment to the U.S. Constitution.

ARGUMENT

I. The Federal Savings and Loan Insurance Corporation, as Receiver for a Failed Savings and Loan Institution, has not been Granted the Authority to Adjudicate State Law Causes of Action Against a Savings and Loan Association in Receivership.

The Fifth Circuit's decision in this case contains no independent analysis of FSLIC's alleged statutory authority to adjudicate creditor claims. Instead, the court relied entirely on its earlier decision in *Hudspeth* in sustaining FSLIC's position. As the court stated: "we have reaffirmed the *Hudspeth* decision several times and are clearly bound by it." 829 F.2d at 564. Petitioner will therefore direct all its arguments regarding FSLIC's claim to adjudicatory power to errors in the *Hudspeth* decision where the rationale for FSLIC's extraordinary assertion of authority is contained. It is Coit's

position that *Hudspeth* is seriously flawed, that its analysis of the powers of FSLIC as receiver of a failed savings and loan association is both inaccurate and incomplete, and that the statutory analysis arrived at in *Hudspeth* raises serious constitutional questions as to the validity of the statutes regulating FSLIC's power as receiver.

A. The Hudspeth Decision

Hudspeth stands for the proposition that creditor claims against a failed savings and loan association, whose assets have been taken over by FSLIC as receiver, must be adjudicated by FSLIC rather than the courts, subject to very limited judicial review in the courts under the APA. *Hudspeth* involved a suit filed by North Mississippi Savings & Loan Association ("North Mississippi") in Mississippi state court for a declaration that a compensation agreement with its former president, Hudspeth, either did not exist or was terminable. *Hudspeth*, 756 F.2d at 1099. Hudspeth counterclaimed for specific performance or damages for breach of contract. *Id.* Thereafter, North Mississippi became insolvent, and FSLIC was appointed receiver of the institution's assets. *Id.* FSLIC terminated the agreement with Hudspeth and stopped payments to him. *Id.* Hudspeth then filed an amended counterclaim joining as a party the new savings and loan created by FSLIC. *Id.* FSLIC removed the action to federal court and successfully moved to dismiss Hudspeth's claims on the grounds that FSLIC, as receiver, had exclusive original jurisdiction to adjudicate creditors' claims. The Fifth Circuit initially ruled against FSLIC.[4] However, on Motion for Rehearing, the court withdrew its first opinion, and issued

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[4] For the text of the original opinion in *Hudspeth*, *see* Petition for Writ of Certiorari, No. 85-294, at 5-7, App. B.

a revised opinion upholding the dismissal of Mr. Hudspeth's complaint. *Id.* at 1099.[5]

The Fifth Circuit's ruling in *Hudspeth* was based on three grounds. First, the Court relied on 12 U.S.C. § 1729(d) which provided FSLIC as receiver with power to "settle, compromise, or release claims . . . subject only to the regulation of the [Board]." Second, the Fifth Circuit relied upon 12 U.S.C. § 1464(d)(6)(C), which provides in pertinent part that "no court may . . . except at the instance of the [Board], restrain or affect the exercise of powers or functions of a conservator or receiver." Finally, the court fortified its decision by reference to certain regulations adopted by the Board concerning procedures for FSLIC's payment of creditor claims. Under these regulations, FSLIC gives notice to creditors to present their claims, and then may disallow claims "not proven to its satisfaction." 12 C.F.R. §§ 569a.8, 549.4. The court concluded that these regulations reinforce the view that FSLIC is empowered to determine the validity of claims as part of its receivership function. Underlying all of the court's analysis was the concern that allowing judicial resolution of creditor claims would "delay the receivership function of distribution of assets," and that "FSLIC would not be able to determine how much to pay other claimants until the termination of the parallel litigation." 756 F.2d at 1102. The court found such a delay to be a "restraint" within the meaning of the statute, and contrary to "the overriding Congressional purpose of expediting and facilitating FSLIC's task as receiver." *Id.*

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[5] *See* T. Pfeiler, *FSLIC Adjudication of Claims Against Receiverships: Has the Search for Efficiency Lost Sight of Due Process?*, 53 Legal Bulletin 433, 439, 471-475 (Sept. 1987) (discussing the motion for rehearing in *Hudspeth*, and publishing text of original opinion.).

B. The Hudspeth Case Was Incorrectly Decided.

Since *Hudspeth* was decided, the Ninth Circuit has handed down its decision in *Morrison-Knudsen Co. v. CHG International, Inc.*, 811 F.2d 1209 (9th Cir. 1986), *cert. pending, sub nom., FSLIC v. Stevenson Associates*, No. 87-451, 56 U.S.L.W. 3249 (Oct. 16, 1987). In *Morrison-Knudsen*, the court analyzed the same statutory framework involved in *Hudspeth*, and concluded that Congress did not provide or intend to confer exclusive adjudicatory power to FSLIC over creditors' claims. *Morrison-Knudsen* is therefore squarely contrary to the Fifth Circuit's holding in *Hudspeth*. While Petitioner will rely upon the arguments in *Morrison-Knudsen*, even *Morrison-Knudsen* does not fully express the deficiencies in the *Hudspeth* analysis.

1. ***The Power to Settle, Compromise, and Release Claims Does Not Constitute a Grant of the Power to Adjudicate to FSLIC.***

At the time of the *Hudspeth* decision, Section 406(d) of the National Housing Act, 12 U.S.C. § 1729(d), provided in pertinent part as follows:

> In connection with the liquidation of insured institutions, the Corporation [FSLIC] shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board . . . .

In the federal district court, FSLIC, in its Memorandum in Support of its Motion to Dismiss, (R. 72), emphasized the language "subject only to the regulation of the Federal Home

Loan Bank Board," thereby seeming to imply that its powers as receiver were subject only to review by the Board. A similar inference seems to have been drawn by the Fifth Circuit in *Hudspeth*. 756 F.2d at 1101. However, such language merely modifies the grant of specific powers to FSLIC, such as the power to "settle, compromise, or release claims." As the court in *Morrison-Knudsen* pointed out, the power to settle, compromise, or release claims "strongly suggest the power of the other party to take the dispute to court." *Morrison-Knudsen*, 811 F.2d at 1219. Simply stated, if FSLIC had been granted the power to adjudicate claims with the force of law, why would it need the power to compromise or settle such claims? The power to compromise or settle claims is inconsistent with the power to adjudicate them.

Furthermore, the position taken by the Fifth Circuit in *Hudspeth* is less consistent with the statutory language than a position which permits creditor claims to be decided in the first instance in the courts. *Hudspeth* concluded that any action before the Board is subject to judicial review under the APA. However, the language "subject *only* to the regulation of the Federal Home Loan Bank Board" (emphasis added), if interpreted to include the power to determine the validity of claims, would also preclude judicial review of FSLIC's administrative decisions even under the APA. Thus, *Hudspeth* is internally inconsistent. Either the power to adjudicate is included within Section 1729(d) and is subject *only* to review by the Board, or it is a power *not* included within the scope of Section 1729(d), in which event it may be exercised by a court. *Hudspeth* attempts to achieve a middle position whereby it concludes that FSLIC has the exclusive power to adjudicate the validity of creditor claims, yet permits limited review by the courts. Such a position is simply not consistent with the statutory language.

A careful reading of the statute shows that the power to adjudicate is simply not one of the powers encompassed within Section 1729(d). Under that provision, the Board's exclusive regulatory authority pertains to (1) the power to carry on the business of and to collect all obligations to the insured institution, (2) the power to settle, compromise or release claims, and (3) the power to do all other things that may be necessary in connection "therewith," i.e., in connection with the previously enumerated powers. Because the power to adjudicate the validity of claims is not specifically mentioned in Section 1729(d), and is not a power that is necessary to the performance of the enumerated functions, Section 1729(d) does not preclude the courts from hearing creditor claims against an insolvent savings and loan institution.[6]

2. The Fifth Circuit Has Misinterpreted the "Restrain or Affect" Language in 12 U.S.C. § 1464(d)(6)(C).

Section 5(d)(6)(C) of the Homeowner's Loan Act of 1933, 12 U.S.C. § 1464(d)(6)(C) states in pertinent part as follows:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or except at the instance of the Board, *restrain or affect* the exercise of powers or functions of a conservator or receiver. (Emphasis added).

The Fifth Circuit held in its *Hudspeth* decision that judicial resolution of creditors' claims would cause a "restraint" on the exercise of the receiver's powers by delaying the distribution of assets. The court reasoned that until the termination

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[6] The power to collect all obligations of the insured institution obviously cannot be read as granting FSLIC the power to decide the validity of its own claims; it merely grants FSLIC the power to pursue collection efforts.

of parallel litigation on the validity of creditors' claims, FSLIC would not be able to determine how much to pay other claimants:

> [R]esolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets: the FSLIC would not be able to determine how much to pay other claimants until the termination of the parallel litigation. Given the overriding Congressional purpose of expediting and facilitating the FSLIC's task as receiver, such a delay is a "restraint" within the scope of the statute.

756 F.2d at 1102.

This interpretation of the "restrain or affect" language is wholly inconsistent with the principles governing common law receiverships, and mistakenly assumes that the receiver's distribution of assets must await the judicial adjudication of creditor claims.

a. *The Fifth Circuit's Interpretation of "Restrain or Affect" is Contrary to the Concept of "Restraint" in Common Law Receiverships.*

The "restrain or affect" language of Section 1464(d)(6)(C) was added to the Homeowners Loan Act of 1933 by the Financial Institutions Supervisory Act of 1966.[7] When the statute was enacted, the prohibition against interference with or restraint upon the functions of receivers, and what constituted such interference or restraint, were well established concepts at common law.

"The starting point in every case involving consideration of a statute is the language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). The Fifth Circuit should have

[7] P.L. 89-695.

interpreted the words "restrain or affect" in a manner consistent with their common law origins because nothing in the legislative history of the statute indicates any Congressional intent to give those terms any specialized meaning.[8] This and other courts have held that where there is no significant legislative history explaining the meaning of a term in a statute, and absent any indications to the contrary, it is fair to assume that Congress used a statutory term in its common law sense. *See Gilbert v. United States*, 370 U.S. 650, 655 (1962); *United States v. London*, 714 F.2d 1558, 1563 (11th Cir. 1983).

Under the common law, it is a general rule that one court cannot disturb property already in the custody of another court or its receiver. *Lion Bonding & Sur. Co. v. Karatz*, 262 U.S. 77, *mod. denied*, 262 U.S. 640 (1923); 65 Am. Jur. 2d Receivers § 174 and cases cited therein. Thus, where the property of a corporation is placed in the possession of a receiver appointed by a court, the property is *in custodia legis*, and hence, no action or proceeding can be maintained against the corporation the effect of which would be to interfere with or restrain the receiver's possession of the property. *Id.* Examples of actions which would interfere with the receiver's possession are ones seeking to recover posses-

[8] *See* S. Rep. No. 1482, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 3532-59; *see also* S. Rep. No. 1263, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Cong. & Admin. News 2530-41, for legislative history of the Bank Protection Act of 1968 which made Section 1464(d)(6)(C) applicable to state-chartered associations placed under FSLIC receivership by the FHLBB. *See also Summertree Venture, III v. FSLIC*, 742 SW2d 446 (Tex. App. — Houston [14th Dist.] 1987, writ denied), for a detailed discussion of the legislative history of the Act and related statutes.

sion of property in receivership[9]; ones for levy of execution upon property in receivership[10]; ones for trespass against the receiver[11]; ones to enjoin distribution of the receivership assets[12]; or to enjoin the receiver's management of the property.[13]

By contrast, it is well established that an action to prove the validity and amount of a claim, i.e., to liquidate a claim, is an *in personam* action which does *not* interfere with or restrain a receiver's possession of the receivership property. *Morris v. Jones*, 329 U.S. 545 (1946); *Riehle v. Margolies*, 279 U.S. 218 (1928); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 69 F.2d 60 (2d Cir. 1934).[14]

In *Morris v. Jones*, this Court, following its earlier decision in *Riehle v. Margolies*, held that an Illinois court appointing a liquidating receiver for an insolvent insurer was required under the Constitution to give full faith and credit to a creditor's judgment for tort damages rendered by a Missouri court against the debtor. The Court stated:

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[9] *See*, e.g., *Kneisel v. Ursus Motor Co.*, 147 N.E. 243 (Ill. 1925), *error dismissed*, 273 U.S. 772 (1926).

[10] *See*, e.g., *Clear Creek Power & Dev. Co. v. Cutler*, 245 P. 939 (Colo. 1926).

[11] *See*, e.g., *Greene v. Odell*, 60 N.Y.S. 346 (App. Div. 1899).

[12] *See* e.g., *Pennsylvania Steel Co. v. New York City Ry. Co.*, 229 F.120 (2d Cir. 1915).

[13] *See*, e.g., *In re Dawley*, 131 A. 847 (1926).

[14] The principles stated by these cases have been applied in federal bankruptcy cases, *see, e.g., Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 517 (2d Cir. 1975), and were recently reaffirmed by this Court. *Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Ass'n*, 455 U.S. 691, 711 n. 19 (1982); *id.* at 718 (White J., concurring in the judgment).

> As pointed out in *Riehle v. Margolies*, the distribution of assets of a debtor among creditors ordinarily has a "two-fold aspect." It deals "directly with the property" when it fixes the time and manner of distribution. No one can obtain part of the assets or enforce a right to specific property in the possession of the liquidation court except upon application to it. But proof and allowance of claims are matters distinct from distribution. They do not "deal directly with any of the property." "The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam.*" *The establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have.*

Id. at 548-49 (emphasis added) (citations omitted).[15]

This distinction between actions to enforce a right to specific property in the possession of the receivership court, and the mere liquidation of a claim which in no way "disturbs" the possession of the receivership court or "affects" title to the property, was well established when the "restrain or affect" language was inserted in the Financial Institutions Supervisory Act of 1966. Accordingly, it is reasonable to assume that what Congress intended by this language was to give FSLIC as statutory receiver the same protections from interference with its dominion and control over receivership property as a common law receiver could have obtained from

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[15] Early decisions of this Court also held that creditors of national banks in receivership could resort to state courts for adjudication of their claims and that such state court judgments were conslusive upon the bank receiver. *See National Bank of Commonwealth v. Mechanics Nat'l Bank*, 94 U.S. 437 (1877); *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 384, 20 L.Ed. 840 (1872).

a receivership court. Absolutely nothing in this language can be read to grant FSLIC the power to adjudicate creditor claims, or to insulate FSLIC from suits like this one which do no more than seek to establish the existence and amount of a claim through an *in personam* action against the insolvent debtor. Accordingly, the Fifth Circuit's reliance on Section 1464(d)(6)(C) as a basis for dismissing the instant case was erroneous because (1) such provision confers no adjudicatory powers on FSLIC, and (2) the instant case was a mere *in personam* action which did not interfere with the receiver's possession of the receivership property and thus did not "restrain or affect" FSLIC's actions as receiver.[16]

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[16] While the statute was designed to preserve the receiver's ability to manage *receivership* property, the district court's dismissal of Coit's claim that the note and deed of trust were unenforceable effectively allows the receiver to *enlarge* the receivership estate by foreclosing on Coit's property without any judicial review. FSLIC has asserted that it has this right under *Hudspeth* and section 1464(d)(6)(C). *See FSLIC v. Hall Whispertree Associates*, 653 F. Supp. 148 (W.D. Tex. 1986). However, FSLIC cannot be allowed to seize property held in the name of others merely under some claim of right without any prior or immediately subsequent judicial review. Such an application of *Hudspeth* would present serious constitutional problems of its own. *See Fuentes v. Shevin*, 407 U.S. 67 (1972).

The obvious answer is that section 1464(d)(6)(C) restrains courts from interfering *only* with a receiver's right to manage or distribute assets *held in the name* of the insolvent institution. The prohibition does *not* apply to assets held in the name of others to which the receiver merely has a claim of right. This is particularly true of a suit like Coit's for a declaratory judgment which, even if it applied to receivership assets, would not restrain or affect the receiver's ability to manage them.

Any broader interpretation of section 1464(d)(6)(C) would have the effect of turning FSLIC into an unstoppable "pac man" gobbling up other people's property while a powerless judiciary stands by. Given the enormous number of home mortgages held by savings and loan associations in this country, the *Hudspeth* doctrine, if not strictly confined to assets held in the name of the insolvent institution, presents a truly frightening prospect for millions of homeowners who might lose their homes if FSLIC suddenly felt "insecure" and decided to foreclose on their mortgages. Under the *Hudspeth* doctrine as presently applied, such homeowners could do nothing in the courts to stop such foreclosures even if they were totally unfounded.

b. *The Fifth Circuit Erroneously Assumed that the Receiver's Distribution of Assets Must Await Judicial Adjudication of Creditor Claims.*

The Fifth Circuit's conclusion in Hudspeth that all creditor claims must be adjudicated by FSLIC so as not to restrain or affect FSLIC's functions or powers as receiver is also erroneous because it is based on the mistaken belief that if creditor claims were allowed to be heard in the courts, FSLIC could not distribute any of the assets of the failed institution until all such claims were fully and finally adjudicated. 756 F.2d at 1102. The Fifth Circuit cites no authority for this proposition. Moreover, the Fifth Circuit's reasoning in this regard is directly contrary to this Court's decision in *Riehle v. Margolies*, where this Court specifically held that because proof and allowance of claims is distinct from distribution of assets, distribution need not be postponed pending the resolution of disputed claims in other courts. As this Court stated:

> The power to fix the time for distribution may include the power, in the exercise of judicial discretion [of the receivership court], to decline to postpone distribution awaiting disposition of litigation in another court over a contested claim.

Id. 279 U.S. at 224. *See also Pennsylvania Steel Co. v. New York City Ry. Co.*, 229 F. 120 (2d Cir. 1915) (Plaintiff unsuccessfully sought an injunction to restrain a receiver from distributing the assets of an insolvent railroad pending the resolution of plaintiff's damage claim in another court.).

Accordingly, the Fifth Circuit's assumption that FSLIC could not make any distribution of receivership assets pending the resolution of claims in parallel litigation is unfounded. The decision to distribute or not to distribute the receivership assets before the validity of all creditors' claims has been finally determined is a decision which is entirely *voluntary* on the part of the receiver; it is not a decision which is taken away from the receiver merely because an *in personam* action for damages or for a declaratory judgment is pending in court which might make it more difficult to determine the amount to be distributed to other claimants. Section 1464(d)(6)(C) is a species of anti-injunction statute which operates only to prevent courts from issuing *coercive judicial decrees* such as injunctions, writs of attachment, writs of sequestration or garnishment; or from asserting *in rem* or *quasi-in rem* jurisdiction, where such actions would interfere with the receiver's freedom to manage or distribute the receivership assets. The mere pendency of an *in personam* action for damages and/or declaratory relief in another court against the insolvent debtor in no way restrains or affects the receiver's freedom to manage or distribute the receivership property under his control.

The Fifth Circuit's assumption that distribution of assets would be delayed by judicial resolution of claims is also inconsistent with the actual practice of receivers for financial institutions. This same problem has arisen in the context of FDIC receiverships over banks, in which banks are frequently liquidated and their assets distributed in a matter of days through the use of a purchase and assumption transaction. *See* Note, *Creditors' Remedies Against the FDIC as Receiver of a Failed National Bank*, 64 Tex. L. Rev. 1429, 1432

(1986).[17] In such situations, distribution of the receivership assets is not delayed even though the judicial determination of the validity of claims may not occur until many months or years after the assets are distributed. If, at a later date, a court determines that the FDIC has wrongfully denied payment of a claim, the FDIC is ordered to pay such claim from its general funds even though all the assets of the failed institution have been distributed. *See First Empire Bank v. FDIC*, 572 F.2d 1361, 1371 (9th Cir. 1978), *cert. denied*, 439 U.S. 919 (1978); Note *supra*, 64 Tex. L. Rev. at 1438.[18]

c. The Fifth Circuit's Interpretation of the "Restrain or Affect" Language is Logically Flawed.

Even if distribution of the institution's assets would in fact be delayed during the pendency of litigation in the courts to determine the validity and amount of creditors' claims, the same type of delay would inevitably be caused by the receiver's own suits to enforce claims of the receivership estate

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[17] The purchase and assumption transaction is also used by FSLIC for insolvent savings and loan institutions. *See* T. Pfeiler, *supra*, 53 Legal Bulletin 433, 441-442 (1987).

[18] Interim distributions are also made by bankruptcy courts. For example, section 502(c)(1) of the Bankruptcy Code authorizes bankruptcy courts to estimate the value of certain contingent or unliquidated claims for the purpose of making interim distributions. *See, e.g., In Re Lane*, 68 B.R. 609, 611 (Bankr. D. Haw. 1986) (estimation of claims against debtor need not await judicial resolution of claim on appeal); *see also Bittner V. Borne Chemical Co.*, 691 F.2d 134, 135-36 (3d Cir. 1982) (method of estimation of claims by and against debtor). There is no reason why FSLIC as receiver could not make interim distributions using the same procedure. Similarly, as indicated by the proof of claim form supplied by FSLIC in this case, FSLIC's own priority rules comtemplate interim distributions. *See* B.A. at 8, ¶ I. *See also* 12 C.F.R. § 549.5-1, and 12 C.F.R § 549.4(d), which allows creditor claims to be paid by the receiver "from time to time, to the extent funds are available, in such manner and amounts as the Board may direct." *See also* 12 U.S.C. § 194 (1982).

in court. Furthermore, delay would also result from the adjudication of creditor claims through the administrative process, including judicial review under the APA. Under the review procedure adopted by the Fifth Circuit, there would first have to be a denial of the claims by FSLIC, then an appeal to the Board, and thereafter a further review by the courts under the APA. There is no reason to believe that such a process would be inherently faster than an initial review of the claims in the courts.[19] In fact, the regulatory scheme governing FSLIC's conduct as receiver provides that many claims must be brought within *three years* after the date of the receiver's appointment.[20] Inasmuch as the receiver was appointed in this case on December 4, 1986 (J.A. 7), such claims need not be made until December 4, 1989.

However, even if administrative adjudication followed by review in the courts would be faster than judicial resolution in the first instance, the receiver's ability to distribute the assets of the failed institution would still be significantly delayed by the administrative process. If distribution must await the disposition of claims, as the Fifth Circuit con-

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[19] If the experience of Mr. Hudspeth is any indication of the time required to complete the administrative process, then the administrative process may actually be much slower than adjudication in the courts. Mr. Hudspeth's "proof of claim" was initially filed with FSLIC on November 27, 1985, and FSLIC did not issue its preliminary decision (denominated a "Notice of Determination") until December 24, 1987, over two years later. See Brief of Amicus Curiae of Joseph M. Hudspeth in Support of Petitioner, pp. 6-8, 1A-4A, and 10A-11A. Inasmuch as the first step in the administrative process has taken over two years, the entire administrative process, which includes an appeal to the Board and then to the courts under the APA, could easily take much longer than initial adjudication in the courts.

[20] *See* 12 C.F.R. § 549.5(a) (share interest claims) and 12 C.F.R. § 549.5-1(c)(1) (claims with respect to demand accounts, savings deposits or savings accounts.)

tended, then even review by the courts under the APA would be a "restraint" contrary to the statute. In short, there appears to be no basis for the conclusion that initial review in the courts of the validity and amount of creditors' claims would restrain or affect the receiver's functions, but administrative resolution of the claims followed by judicial review under the APA would not.[21] As the Ninth Circuit stated in *Morrison-Knudsen*:

> If judicial review, which will delay — perhaps by years — the liquidation process, does not restrain or affect a receiver, then why does *initial* adjudication by a court of creditors' claims do so? *Hudspeth* provides no answer. Section 1464(d)(6)(C) does not speak in terms of the magnitude of such restraint or effect.

811 F.2d at 1216-17.

Finally, as pointed out by the court in *Morrison-Knudsen*, "Section 1464(d)6)(C) does not add to FSLIC's receivership powers; it simply prohibits courts from interfering with those powers, which FSLIC must derive from other statutory sources." 811 F.2d at 1217. Accordingly, to the extent that the Fifth Circuit relied upon Section 1464(d)(6)(C) in *Hudspeth* as a statutory basis for FSLIC's authority to adjudicate the validity of creditors' claims, such reliance was misplaced. A prohibition on interference by the courts is not an adequate substitute for an affirmative grant of adjudicatory power to FSLIC. As the court stated in *Morrison-Knudsen:* "FSLIC is unable to locate a single explicit indication in the legislative history or the language of its governing statutes that Con-

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[21] In the instant case, judicial adjudication would appear to have actually been faster. Coit's trial in state court was set for August, 1987, but as of May 5, 1988, the date of this Brief, the only decision that FSLIC has made is to retain Coit's claim for further review. (B.A. 47-48).

gress intended or expected FSLIC to adjudicate claims as part of its receivership functions." 811 F.2d at 1219. In the absence of an explicit legislative grant of such powers, this Court should avoid a construction of Section 1464(d)(6)(C) that prohibits resolution of creditor claims through traditional judicial channels.

3. *Board Regulations Regarding the Allowance or Disallowance of Claims do not Authorize Adjudication By FSLIC.*

In its Memorandum in Support of its Motion to Dismiss filed in the district court, FSLIC argued that "the Bank Board has adopted regulations establishing an administrative claims procedure under which FSLIC is expressly authorized to adjudicate the merits and priorities of creditors' claims against the failed association." (R 75-6). FSLIC relies upon 12 C.F.R. § 549.5-1(b)(2), which is applicable to federally chartered institutions such as FirstSouth, and provides in pertinent part as follows:

> The receiver shall approve any seasonably filed claim proved to its satisfaction. The receiver may wholly or partly disallow any claim of security, preference, or priority not so proved and shall notify the claimant of the disallowance and the reason therefor.

The Fifth Circuit in *Hudspeth* relied upon analogous regulations applicable to state-chartered institutions in concluding that FSLIC was "empowered to decide claims as part of its receivership functions." 756 F.2d at 1103. FSLIC's argument in this case, and the Fifth Circuit's reliance in *Hudspeth* on the Board regulations, are equally misplaced.

First, none of these regulations say anything about the adjudication of claims. Rather, what the regulations involve is

FSLIC's authority to either "approve" or "disallow" claims. These terms simply mean that FSLIC has the right in the first instance to decide whether to pay or refuse to pay a claim; they do not grant to FSLIC the power to enter a decree binding on all parties that determines the validity of a creditor's claim. As the Ninth Circuit stated in *Morrison-Knudsen*:

> FSLIC and the Board must be permitted to exercise some judgment before paying a claim against a thrift institution. Paying or refusing to pay, however, is not an adjudication of a claim. The language of the regulation does not purport to give FSLIC the power to enter conclusive factual and binding legal findings. FSLIC is no more an adjudicator under this regulation than is an insurance company authorized to "disallow" any claim not proved to its satisfaction and required to notify claimants thereof. The administrative process that the regulation prescribes authorizes FSLIC and the Board, by disallowance of a claim and notice to the claimant, to determine *whether a dispute exists*. It does not empower FSLIC to *resolve the dispute with the force of law*.

811 F.2d at 1218 (emphasis in original).

Second, FSLIC's authority to approve claims "proved to its satisfaction" and to disallow claims "not so proved" is an entirely subjective standard, and as such is contrary to the objective standards associated with an impartial adjudication. Assuming that, under *Hudspeth*, FSLIC's denial of a claim not "proved to its satisfaction" would be reviewable by a court under the substantial evidence standard, the reviewing court would find itself in the position of attempting to determine whether substantial evidence existed to support FSLIC's conclusion that the claim was not proved to FSLIC's satisfaction. Such a standard of review is almost meaningless. Thus,

the conclusion that this regulation was intended to confer adjudicatory power upon FSLIC leads to an absurd result. The better interpretation is that this language is consistent with FSLIC's role as insurer, i.e., FSLIC has the right in the first instance to decide whether to pay or refuse to pay a claim; and the Board can overrule FSLIC's decision just as the management of an insurance company can overrule the decision of a claims adjuster. However, if the ultimate administrative decision is not to pay, the resulting dispute must then be resolved by the courts.

Finally, Congress has given the FDIC the same power by statute that the Board has given FSLIC by regulation, namely the power to receive proof of creditors' claims and to pay only "such claims as may have been proved to [its] satisfaction." 811 F.2d at 1218; 12 U.S.C. §§ 193, 194, 1821(d). The Ninth Circuit stated that "the FDIC has never claimed, and no court has ever found, that these powers vest the agency rather than the district court with the ultimate power to adjudicate creditors' claims." 811 F.2d at 1218. Apparently, the FDIC has not sought the imaginative expansion of powers that FSLIC now claims.[22]

4. Other Provisions Contradicting Hudspeth

The Fifth Circuit's analysis in *Hudspeth* also ignored various statutory provisions which directly contradict the conclusion that FSLIC has the exclusive authority to adjudicate creditors' claims. First, in 12 U.S.C. § 1725(c)(4), Congress expressly included within FSLIC's general powers the capacity to "sue and be sued." This would tend to indicate that

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[22] *See also* T. Pfeiler, *supra*, 53 Legal Bulletin 433, 465-67, n.119 (1987), for a discussion of the similarities between the FDIC and FSLIC statutory receivership schemes.

Congress viewed FSLIC more as a potential litigant than as an administrative tribunal.

Second, 12 U.S.C. § 1730(k)(1) expressly includes, within the category of suits Congress expected FSLIC to litigate in court, an action against FSLIC "in its capacity as . . . receiver . . . which involves only the rights . . . of . . . creditors." This section states in pertinent part:

> Notwithstanding any other provision of law, . . . (B) any civil action, suit, or proceeding to which the Corporation [FSLIC] shall be party shall be deemed to arise under the laws of the United States. . . . *Provided*, That *any action, suit, or proceeding to which the Corporation is a party in its capacity as* conservator, *receiver*, or other legal custodian of an insured State-chartered institution and *which involves only the rights* or obligations *of* investors, *creditors*, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. (Emphasis added).

This proviso clause, which was intended to keep certain actions in state courts, indicates what type of suits Congress expected FSLIC to defend against in state courts. While this proviso technically applies only to state-chartered institutions, there is no indication that Congress intended to treat federally-chartered and state-chartered associations differently in this regard. *Morrison-Knudsen*, 811 F.2d at 1221.

Third, 12 U.S.C. § 1728(c) includes a statute of limitations applicable to depositors' actions against the agency. This section clearly indicates Congress' expectation that disputed claims would be adjudicated in court. *Morrison-Knudsen*, 811 F.2d at 1220 (citing *Jugum v. FSLIC*, 637 F. Supp. 1045, 1047 (W.D. Wash. 1986)). The court stated:

> [The] logical inference is that FSLIC may adjudicate neither *depositors'* nor *creditors'* claims. To assume that FSLIC must litigate *depositors'* claims, with which it has great expertise, but may adjudicate *creditors'* claims against the institution in receivership, as to which its expertise is much less, is not a rational interpretation of the statutory scheme.

Morrison-Knudsen, 811 F.2d at 1220 (emphasis in original). In fact, the legislative history indicates that the statute is intended to protect both depositors and creditors. *See* S. Rep. No. 536, 97th Cong., 2d Sess. 1 (1982).

Finally, the fact that the FDIC has been granted powers parallel to FSLIC, but has never attempted to assert the extraordinary powers which FSLIC now claims, further undermines FSLIC's position. In 1982, Congress extensively amended the statutory provisions regarding FSLIC's receivership functions in an act that clarified and augmented both FSLIC's and the FDIC's powers as receiver. *Morrison-Knudsen*, 811 F.2d at 1221, citing the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. 97-320, 96 Stat. 1469 (1982) (the "Depository Institutions Act"). While FSLIC's asserted power to adjudicate could have been distinguished from the FDIC's, there was no such distinction; rather, the legislative history of these amendments indicates that the powers of FSLIC and the FDIC were to be equal. *See* S. Rep. No. 536, 97th Cong., 2d Sess. 7 (1982). Likewise, had Congress intended to include adjudication of creditors' claims in its augmentation of FSLIC's powers as receiver, it could easily have done so; yet there is absolutely no such indication

anywhere in the nearly 100 pages of amendments included in the Depository Institutions Act.[23]

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[23] Another problem with the Fifth Circuit's interpretation of FSLIC's enabling legislation is that it would cause unitary claims to be split up and tried in different forums, one administrative and one judicial. For example, if Coit's claims for usury and breach of fiduciary duty had been allowed to proceed in federal district court, then FSLIC's claim on the indebtedness allegedly owed FirstSouth would have been considered a compulsory counterclaim and all such claims (including Coit's defenses to FSLIC's suit on the debt) would have been tried in the same proceeding. This would have furthered the purposes behind Fed. R. Civ. P. 13(a), which is designed to prevent a multiplicity of actions. *See Southern Construction Co. v. United States*, 371 U.S. 57 (1962); *Stancill v. McKenzie Tank Lines, Inc.*, 497 F.2d 529 (5th Cir. 1974).

However, because of *Hudspeth*, Coit's affirmative claims and even its allegation that the note and deed of trust are unenforceable are switched to the administrative track, while FSLIC remains free to assert its claims on the debt in court. This is unfair for two reasons. First, it unjustly places defenses in a different forum from the claims to which they pertain. *See*, e.g., *Para-Chem Southern, Inc. v. M. Lowenstein Corp.*, 715 F.2d 128, 132 (4th Cir. 1983) (recoupment defense).

Secondly, this procedure prevents claims and counterclaims from being offset against one another, *see e.g., Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1 (1980); *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 366 (3d Cir. 1975), and permits FSLIC to use the administrative proceeding to create defenses in the judicial proceeding. For example, FSLIC can deny Coit's claims in the administrative proceeding, and when Coit tries to defend against FSLIC's deficiency claims in court, FSLIC can contend that Coit's defenses are barred by the administrative ruling. Such a procedure not only violates fundamental notions of fairness, it undermines sound principles of judicial economy by placing claims and defenses relating to a single transaction in different forums, and subjecting them to entirely different rules of evidence and procedure. Such a result is so unwieldy and so unjust that it should not readily be attributed to Congress.

C. This Court Should Construe the Applicable Statutes and Regulations to Avoid Serious Doubt of Their Constitutionality.

Should this Court construe the applicable statutes and regulations as a grant of exclusive power to FSLIC to adjudicate the validity of creditors' state law claims, as it did in *Hudspeth*, serious doubt as to the constitutionality of such statutes and regulations will be raised. As discussed more fully below, such a construction will require this Court to decide constitutional challenges based upon the separation of powers under Article III, Section 1, the due process clause of the Fifth Amendment, and the right to a trial by jury under the Seventh Amendment. Construing these statutes and regulations in such a manner will therefore conflict with a basic tenet of judicial restraint, which requires this Court to construe federal statutes in such a way "as to avoid serious doubt of their constitutionality." *Machinists v. Street*, 367 U.S. 740, 749 (1961); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979).

Where such "serious doubts" arise, a court should determine whether a construction of the statute is "fairly possible" by which the constitutional question can be avoided. *Street*, 367 U.S. at 749; *Crowell v. Benson*, 285 U.S. 22, 62 (1931). For this Court to construe the applicable statutes and regulations as granting FSLIC powers as a receiver and not as adjudicator is not only "fairly possible," it is a construction better supported by historic precedent and logic: the "entire statutory framework strongly suggests that Congress intended FSLIC to be a receiver, not an adjudicator." *Morrison-Knudsen*, 811 F.2d at 1219. Such a construction would also be consistent with this Court's obligation to construe statutes in a manner that preserves their constitutionality.

D. Petitioner's Constitutional Claims are Ripe for Adjudication.

The Fifth Circuit refused to consider Petitioner's constitutional arguments on the grounds that such arguments were "not ripe for resolution at this time." 829 F.2d at 565. The court reasoned that "FSLIC may allow all or some of Coit's claims, depriving Coit of standing and a grievance." *Id.*

The precise legal basis for the Fifth Circuit's ruling is unclear. Although the court held that Coit's claims were not "ripe" for resolution, its stated rationale for denying review was the possibility that Coit could be successful in the administrative process, a rationale that has traditionally been used to describe the requirement that administrative remedies be exhausted.[24]

Consideration of Coit's constitutional claims is not barred either by the exhaustion of administrative remedies requirement or by the doctrine of ripeness. The exhaustion requirement is not applicable here because "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."[25] As a result, constitutional challenges to a legislative scheme constitute a major exception to the exhaustion re-

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[24] *See e.g., McKart v. United States*, 395 U.S. 185, 195 (1969) ("A complaining party may be unsuccessful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene."); *see also Hodges v. Callaway*, 499 F.2d 417, 423 (5th Cir. 1974) ("Exhaustion is required in part because of the possibility that administrative review might obviate the need for judicial review.").

[25] *Oestereich v. Selective Service System*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result), quoted with approval in *Johnson v. Robison*, 415 U.S. 361, 368 (1974).

quirement.[26] As this Court stated in *Public Utilities Commission v. United States*, 355 U.S. 534 (1958):

> If . . . an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued. But where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right.

Id., 355 U.S. at 539-40.

Coit's constitutional claims are also ripe for adjudication. In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), this Court established a two-fold test for ripeness, requiring the evaluation of (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. Both of these requirements are met in this case.

The fitness requirement is met because, as in *Gardner*, the issues tendered are "purely legal ones." 387 U.S. at 149. Accordingly, there is no need for further factual development by the administrative agency. Because this Court will be in no better position later than it is now to decide these questions, the issues are presently ripe for adjudication. *Duke Power Co. v. Carolina Envir. Study Group, Inc.*, 438 U.S. 59, 83 (1978).

Coit will also suffer considerable hardship if judicial review is postponed. On October 9, 1987, FSLIC sent Petitioner a notice of acceleration and foreclosure on real property under

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[26] *See Public Utils. Comm'n v. United States*, 355 U.S. 534, 539-40 (1958); *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1556 (11th Cir. 1985); *McGowan v. Marshall*, 604 F.2d 885, 892 (5th Cir. 1979).

mortgage to FirstSouth. (*See* P.A. 18-19; B.A. 16-26). While actual foreclosure proceedings have temporarily been held in abeyance, FSLIC can reinstitute foreclosure proceedings at any time during the administrative process, thereby causing Petitioner irreparable injury even if its constitutional claims and its underlying monetary claims against FirstSouth are ultimately vindicated in the courts.[27] Delaying resolution of Petitioner's constitutional challenge to *Hudspeth* places FSLIC in the unique position of being able to foreclose on Petitioner's properties even though Coit asserted defenses to the debts upon which the foreclosures were based and requested a declaratory judgment in the state court proceedings that the note and deed of trust were unenforceable. So long as Petitioner is confined to its administrative remedies, Petitioner is unable to protect itself in the courts against wrongful foreclosure. Furthermore, FSLIC's threatened foreclosure impairs Coit's ability to sell or improve the property by placing a cloud on Coit's title which can only be removed by an adjudication of Coit's claims that the note and deed of trust are unenforceable. This is a particular hardship in a volatile real estate market.

Secondly, if Coit is correct in its constitutional claims, the time spent in the administrative process will have been wasted and Coit will have to begin all over again in the courts. This substantial delay will cause significant and uncompensable damages to Coit. Under Texas law, Coit would be entitled to an award of prejudgment interest if it prevails on its damage claim against FirstSouth for breach of fiduciary

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[27] In this connection it should be noted that FSLIC cannot destroy ripeness by now promising not to exercise its right of foreclosure. *Cf., Abbott Laboratories*, 387 U.S. at 154, where this Court rejected a promise by the Solicitor General to forego use of criminal prosecution as an insufficient rebuttal to the argument that the hardship requirement had been met.

duty and implied duty of good faith and fair dealing.[28] Such an award has been held to be necessary to fully compensate a claimant for his injury. *Cavnar*, 696 S.W.2d at 553, n.2. However, because Coit is suing an insolvent debtor, the assets of which are by definition insufficient to satisfy the debts to all claimants in full, the time required by the administrative process will cause an uncompensable injury to Coit because it will not be able to recover prejudgment interest for the additional delay.[29]

This irreparable injury is distinct from the ordinary expense and annoyance of litigation. While Petitioner recognizes that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury" for purposes of the hardship requirement,[30] an award of prejudgment interest from the date of injury to the date of judgment is part of the remedy under Texas law. Because the debtor in this case is insolvent and cannot pay prejudgment interest, the additional delay caused by requiring completion of the administrative process will further reduce the value of any

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[28] *See Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985); *Maxey v. Texas Commerce Bank of Lubbock*, 571 S.W.2d 39, 50-51 (Tex. Civ. App. — Amarillo), *writ ref'd n.r.e.*, 580 S.W.2d 340 (1978) (Bank assessed prejudgment interest on damages resulting from bad faith sale of collateral.).

[29] *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1 (1980) (In deciding whether to certify case for immediate appeal under Fed. R. Civ. P. 54(b), district court could properly consider prejudice to defendant that would result from delay in entering judgment in circumstances where legal rate of interest was below the existing market rate of interest.); *Cf., Duke Power Co.*, 438 U.S. at 71, n.15 (This Court permitted individuals to obtain a declaration regarding the constitutionality of governmental action "before potentially uncompensable damages are sustained.").

[30] *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (quoting *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974)).

recovery which Coit might ultimately obtain on its claims, quite apart from the costs of the litigation.

Finally, delay may impair Coit's ability to collect any judgment it might ultimately obtain because of the deteriorating financial condition of FirstSouth. *Cf. Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 12 (1980) ("If [General Electric's] financial position were such that a delay in entry of judgment on Curtiss-Wright's claims would impair Curtiss-Wright's ability to collect on the judgment, that would weigh in favor of certification"). Postponement of Petitioner's constitutional challenges therefore imposes a substantial hardship on Petitioner, which fully satisfies the ripeness requirement.[31]

II. Allowing FSLIC to Adjudicate All Claims Brought Against an Insolvent Savings and Loan Association Violates the Mandate of Separation of Powers in Article III of the U.S. Constitution.

Article III, Section 1, of the U.S. Constitution ("Article III") directs that the "judicial power of the United States shall be vested . . . in such inferior courts as the Congress may from time to time ordain and establish," and provides that the judges of such courts shall hold office during good behavior. The framers of the United States Constitution included this provision to ensure the independence of the federal judiciary from the control of the executive and legislative branches of government. Independence of the federal judiciary safeguards the checks and balances of the constitutional struc-

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[31] Ripeness could also be based in this case on the grounds that the agency proceeding suffers from a fundamental infirmity requiring judicial intervention to protect petitioner's rights to a fair proceeding. *Gulf Oil Corp. v. United States Dep't of Energy*, 663 F.2d 296, 312 (D.C. Cir. 1981); *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1156-57 (D.C. Cir. 1979), *cert. denied* 447 U.S. 921 (1980) (bias in rule-making proceedings).

ture and guarantees that the process of adjudication itself will remain impartial. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 59 (1982) ("*Marathon*").

This Court has carefully guarded the independence of the federal judiciary, permitting tribunals created by the legislature to exercise adjudicative power only in certain circumscribed areas in which the congressional assertion of power to create legislative tribunals is "consistent with . . . the constitutional mandate of separation of powers." *Marathon*, 458 U.S. at 64; *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S. Ct. 3245, 3261 (1986) ("*Schor*"). To the extent that FSLIC's enabling legislation is construed to give FSLIC adjudicatory powers over state law claims affecting the assets of an insolvent association, such legislation violates the constitutional mandate of separation of powers.[32]

A. Controlling Supreme Court Precedents

This Court held in *Marathon* that Article III was violated by a legislative scheme, very similar to the one at issue here, by which Congress empowered bankruptcy judges to adjudicate all claims that might affect the assets of a bankrupt estate. The bankruptcy courts, whose judges were appointed by the President of the United States for 14-year terms and whose

[32] The Dallas Court of Appeals so held in *Glen Ridge I Condominiums, Ltd. v. FSLIC*, 734 S.W.2d 374 (Tex. App. — Dallas 1986), *writ denied per curiam, FSLIC v. Glen Ridge I Condominiums, Ltd.*, 31 Tex. Sup. Ct. J. 294 (March 30, 1988) and the Ninth Circuit Court of Appeals has expressed grave concern that FSLIC's assertion of adjudicatory jurisdiction creates "series constitutional difficulties" under Article III. *Morrison-Knudsen*, 811 F. 2d at 1221.

On March 30, 1988, the Texas Supreme Court denied FSLIC's application for writ of error in *Glen Ridge I* in a per curiam opinion. 31 Tex. Sup. Ct. J. at 296. The court never reached the Article III issue because it found that FSLIC was not granted adjudicatory power under the applicable statutes and regulations. *Id.*

salaries were subject to adjustment by the legislature, were not Article III courts. This Court held that the legislative grant of judicial power to non-Article III tribunals did not fall within any of the circumscribed areas in which such delegation had been held to be consistent with Article III. Although Congress could constitutionally delegate to non-Article III courts the power to determine issues involving the "restructuring of debtor-creditor relations," which was held to be "at the core of the federal bankruptcy power," *Marathon*, 458 U.S. at 71, Congress could not constitutionally delegate to those courts the power to adjudicate any and all state-created private rights that might affect the assets of the estate in bankruptcy. The Court distinguished "private rights" under common law from "public rights," whose adjudication could be freely delegated by the Legislature because they arose in areas traditionally within the province of the legislative and executive branches of government. Examples of such "public rights" arising "between the Government and persons subject to its authority" included rights in such areas as interstate and foreign commerce, taxation, immigration, public lands, and public health. *Marathon*, 458 U.S. at 68-70 and n.22 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). Because the *Marathon* plaintiffs' claims for breach of warranty, breach of contract, duress, coercion, and misrepresentation were not "public rights," but rights *under common law arising between private parties* and historically determined by the courts, the bankruptcy court's broad assumption of jurisdiction over their adjudication violated the constitutional mandate of separation of powers.

In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), this Court upheld the delegation to non-Article III tribunals of power to adjudicate disputes between participants in a federal pesticide registration program. The Federal Insecticide, Fungicide, and Rodenticide Act

("FIFRA"), 7 U.S.C. §§ 136 *et seq.*, requires manufacturers of pesticides to register their pesticides with the Environmental Protection Agency ("EPA"). As a precondition to registration, manufacturers must submit research data to the EPA regarding the pesticides. Before 1972, the EPA without statutory authority considered data submitted by one registrant to support the registration of the same or a similar product by another registrant. Congress then expressly permitted the EPA to consider previously submitted data, and as an incentive to continued research and development by manufacturers, enacted a statutory scheme to compensate registrants under FIFRA whose data were used in registering other pesticides.

This Court held that the FIFRA scheme, which required that compensation disputes be submitted to binding arbitration with limited judicial review, did not violate Article III. The Court noted that as a matter of state law, property rights in trade secrets are extinguished when a company discloses its trade secret to persons who are not obligated to protect the confidentiality of the information. Therefore, any right of pesticide registrants to compensation resulted solely from rights created by Congress under FIFRA. Because the rights whose adjudication was delegated were not common law rights, but "public rights" created by Congress, Congress had broad authority to delegate their adjudication to tribunals of its creation.

In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), Congress granted the Commodity Futures Trading Commission ("CFTC") the power to adjudicate not only reparations actions against commodity brokers for violations of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 1 *et seq.*, but also counterclaims arising from the same transaction or occurrence as the reparations action. The Court held that the delegation of adjudicatory power over

those counterclaims did not violate Article III because the litigant in *Schor* had indisputably waived any right he might have had to full trial of his counterclaim in an Article III court. The Court went on to note, however, that permitting the agency to exercise jurisdiction over counterclaims arising out of the same transaction or occurrence as a broker's violation of the Act was much more consistent with the constitutional mandate of separation of powers than was the bankruptcy scheme that was held unconstitutional in *Marathon*. In *Marathon*, the bankruptcy courts were granted broad jurisdiction to determine all civil proceedings "related to" cases in which a petition had been filed under Title 11. Unlike *Marathon*, counterclaims in *Schor* were limited to particularized areas of law and fact, namely, those counterclaims arising from the same facts as violations of the Act. Additionally, the legislative scheme in *Schor* removed less power from the federal district courts than did the scheme in *Marathon*. The CFTC's permissive jurisdiction in *Schor* made no attempt to oust the federal court's original jurisdiction, and the CFTC's decisions were to be reviewed under the "weight of evidence" standard, rather than the more deferential standard used to review decisions of the bankruptcy courts in *Marathon*. The Court in *Schor* thus held that the *non-exclusive* grant to the CFTC of jurisdiction over a *narrow class* of common law claims as an *incident* to the CFTC's *unchallenged* adjudicative function did not substantially threaten the separation of powers. *Schor*, 106 S. Ct. at 3259-60.

B. Breadth of FSLIC's Asserted Jurisdiction

The jurisdiction that FSLIC asserts here over claims against insolvent savings associations in receivership goes far beyond the scope of delegation that this Court has permitted to coexist with the constitutional mandate of separation of powers. The delegation of power to FSLIC encroaches on the

powers usually vested in courts to a substantially greater degree than the legislation in *Schor* or *Thomas*. First, the breadth of adjudicatory power that FSLIC has embraced resembles very closely that granted to the bankruptcy courts and found to violate Article III in *Marathon*. FSLIC has asserted jurisdiction not over a narrow, particularized area peculiarly within its technical expertise as a federal executive agency, such as was found permissible in *Schor* and *Thomas*, but instead insists that it has the power to adjudicate any and all claims of any sort brought against an insolvent savings and loan association under its receivership, including common law claims and claims over which Congress has given federal courts exclusive jurisdiction.[33] FSLIC in this case alone asserts exclusive jurisdiction over causes of action based on usury, breach of fiduciary duty, and breach of an implied duty of good faith and fair dealing, claims which fall squarely within the realm of judicial power at common law. As in *Marathon*, such jurisdiction encompasses not only the permissible "public rights" issues involving the reorganization of insolvent savings and loan associations, but all manner of common law claims historically at the very core of judicial power. The breadth of claims over which FSLIC asserts jurisdiction is thus no narrower than the breadth of claims decided by most federal district courts.

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[33] FSLIC has asserted exclusive jurisdiction over a broad spectrum of claims ranging from antitrust to race discrimination. *See e.g., Baer v. Abel*, 637 F. Supp. 347 (W.D. Wash. 1986) (RICO, negligence, fraud, and misrepresentation); *FSLIC v. Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987) (unjust enrichment and conversion); *FSLIC v. Provo Excelsior, Ltd.*, 664 F. Supp. 1405 (D. Utah 1987) (fraud, violation of state and federal securities law and state and federal racketeering laws); *Resna Associates, Ltd. v. Financial Equity Mortgage Corp.*, 673 F. Supp. 1371 (D.N.J. 1987) (race discrimination); *Red Fox Indus., Inc. v. FSLIC*, 832 F.2d 340 (5th Cir. 1987) (antitrust). Theoretically, *Hudspeth* would apply even to an intersection collision case between a vehicle owned by a failed savings and loan institution and a hapless pedestrian.

C. Exclusivity of FSLIC's Asserted Jurisdiction

Further, in moving to dismiss Coit's action, FSLIC insists that its right to adjudicate claims against FirstSouth ousts the district court of such jurisdiction. Vital to this Court's holding in *Schor*, however, was the fact that the CFTC's jurisdiction was not exclusive, but concurrent with that of the courts.

> It is clear that Congress has not attempted to "withdraw from judicial cognizance" the determination of [the counterclaim]. Congress gave the CFTC the authority to adjudicate such matters, but *the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected*. In such circumstances, separation of powers concerns are diminished . . . Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.

Schor, 106 S. Ct. at 3260 (emphasis added). Unlike *Schor*, where the parties had the right to elect a forum, Coit without its consent has been totally deprived of its original choice of forum. The risk of encroachment on the judiciary is clearly at a maximum here where FSLIC asserts not concurrent but exclusive jurisdiction over claims that have traditionally been determined by courts.

D. Judicial Review of FSLIC's Decisions

Additionally, the federal courts here retain less power to review decisions of FSLIC than the courts retained over the CFTC's decisions in *Schor*. In *Schor*, the CFTC's orders were reviewed under the "weight of the evidence" standard, not the more deferential "clearly erroneous" standard employed in *Marathon*. In the absence of specific congressional direction, the determinations of FSLIC will be reviewed, if at all, under the "arbitrary and capricious" standard of the APA, or, at best, the APA's "substantial evidence standard," *see Morri-*

son-Knudsen, 811 F.2d at 1222, which accords FSLIC more deference even than the "clearly erroneous" standard accorded to decisions of district courts.[34]

E. Congressional Purpose

Furthermore, delegating power to FSLIC to adjudicate all claims that may affect insolvent savings and loan associations serves a less substantial public purpose than the delegations of power in *Thomas* and *Schor*. Because FSLIC has only recently in its 50-year history asserted that it has power to *adjudicate* claims of any sort, FSLIC has no particular expertise in adjudicating at all, much less in adjudicating claims under the common law. In *Thomas*, channeling to an agency tribunal all disputes among pesticide registrants as to compensation for use of data streamlined the resolution of disputes because the EPA arbitration panel had developed an expertise in that *narrow* area of law, i.e., compensation under FIFRA's guidelines. Similarly in *Schor*, the counterclaims which the CFTC was permitted to adjudicate were limited in their facts, in that they by very definition arose from the same facts involving violations of the Commodity Exchange Act, as to which the CFTC was expert.

Permitting agencies such as those in *Schor* and *Thomas* to adjudicate a narrow range of claims involving law and facts over which they have gained technical expertise encroaches on the judiciary only minimally. At the same time, because the agencies' expertise in these limited areas enables them to render speedy decisions based on a correct assessment of the law and facts, permitting such adjudication also serves legitimate public needs. Unlike the agencies in *Schor* and *Thomas*, however, FSLIC here, if permitted to adjudicate all claims

[34] *Millar v. FCC*, 707 F.2d 1530, 1540 (D.C. Cir. 1983); *see also Newsweek v. United States Postal Serv.*, 663 F.2d 1186, 1210 (2d Cir. 1981); *Refrigerated Transport Co. v. I.C.C.*, 663 F.2d 528, 531 (5th Cir. Unit B 1981).

brought against insolvent savings and loan associations under a FSLIC receivership, will not be dealing "only with a 'particularized area of law' " as to which it has developed technical expertise, but will exercise jurisdiction no less broad than that found unconstitutional in *Marathon*. *Schor*, 106 S. Ct. at 3258. The claims heard by FSLIC will not fall neatly within the areas involving the restructuring of savings and loan associations in which FSLIC has developed expertise, but will run the gamut of claims now heard by district courts. FSLIC is no better equipped to determine such claims than a court. FSLIC's supposed ability to reach an initial adjudication faster than a court likewise does not excuse violating Article III. This Court has long held that mere administrative convenience cannot justify violating the Constitution. *See, e.g., Tashjian v. Republican Party of Conn.*, ___ U.S. ___, 107 S. Ct. 544, 551 (1986).

F. Coit's Claims Are Not "Public Rights."

Last, there is no question here but that the rights on which Coit sues are not "public rights." Coit's allegations that FirstSouth committed usury and breached fiduciary duties and duties of good faith and fair dealing are not claims that arose in the context of any federal legislation. Coit is not suing on any federally created cause of action. Unlike the plaintiff in *Thomas*, Coit has taken no voluntary action, indeed no action whatsoever, to extinguish its common law rights. These rights vested independently of and prior to FSLIC's assumption of receivership power over FirstSouth. The mere fact that FSLIC became receiver of FirstSouth and substituted itself as defendant in this action in place of FirstSouth does not magically transform Coit's vested private rights into public rights. Because Coit's rights against FirstSouth have not been extinguished, and because Coit's causes of action were not created by federal statute, Coit's claims do not involve "public rights."

G. Conclusion

Because FSLIC's enabling legislation, as construed, encroaches impermissibly on the powers of the judiciary without meeting any substantial and legitimate public need, it violates Article III, § 1, of the U.S. Constitution.

III. Requiring Coit to submit its claims against FirstSouth to FSLIC for adjudication would deny Coit due process of law.

The due process clause of the Fifth Amendment of the U.S. Constitution entitles parties in administrative proceedings, as well as in civil and criminal cases, to an impartial and disinterested tribunal. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43, and n.2 (1980); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). Due process prohibits requiring a litigant to submit the adjudication of his rights to an official who "perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial." *Ward v. Monroeville*, 409 U.S. 57, 60 (1972); *Tumey v. Ohio*, 273 U.S. 510, 534 (1927).

The right to an impartial and disinterested tribunal may be violated even though the particular public official who acts as judge has no personal pecuniary interest in the outcome of the litigation. It is sufficient that the institution which the official represents has such a financial interest. *See Ward v. Monroeville*, 409 U.S. 57, 60 (1972) (mayor's responsibility for village financing made mayor partisan to maintain high level of contribution to village's coffers). Furthermore, this Court has recognized that the financial stake required to trigger a due process violation may be as indirect as an incentive to secure an advantage in other litigation, *see Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 1586-87 (1986), or an interest in reducing competition from a competitor. *See Gibson v. Berryhill*, 411 U.S. 564 (1973).

A. *FSLIC's pecuniary interest*

FSLIC is barred from adjudicating Coit's claims against FirstSouth, because it has an improper pecuniary interest in the outcome of those claims. As liquidating receiver for FirstSouth's assets, FSLIC must promptly reimburse FirstSouth's depositors from FSLIC's insurance fund. However, once it pays FirstSouth's depositors, it becomes the single largest claimant against FirstSouth's assets because it becomes subrogated to the claims of the reimbursed depositors.[35] As a competing claimant to the assets of FirstSouth, FSLIC has a direct, pecuniary interest in denying Coit's claims against the assets of FirstSouth. Clearly, the more creditor claims that FSLIC denies, the greater will be the funds available to satisfy FSLIC's own subrogation claims.[36]

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[35] *See Morrison-Knudsen*, 811 F.2d at 1215-16 (FSLIC "becomes both the holder of the claimed assets and, because subrogated to the reimbursed depositors' rights, the single largest claimant against such assets."); *see also Savings and Loan Receiverships: Hearings on S. 3436 Before the Senate Comm. on Banking and Currency*, 95th Cong., 2d Sess., 8, 10-11 (1968), where John E. Horne, then chairman of the FHLBB, testified:

> . . . . Usually 96 percent of the money in a savings and loan association, and frequently even in excess of that, is insured savings, and so, *when we pay out an insured association*, we pay in excess of 96 percent and *we* have *become by far the largest claimant and necessarily the party most concerned about how the matter is handled thereafter*. The claim of the FSLIC, as I have said, is overwhelmingly larger than that of any other claimant in a receivership.
>
> . . . .
>
> It is clear that *the Corporation, given its huge financial interest in every case, is the most highly motivated party* available to do the job in an orderly and economical way. (Emphasis added).

[36] *See United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), *aff'd per curiam by equally divided court*, ___ U.S. ___, 107 S.Ct. 2171 (1987), where the court held that the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1381 *et seq.*, deprived withdrawing

B. *FSLIC's adversary interest*

Requiring Coit to submit its claims to FSLIC will also place Coit at the mercy of a tribunal that is its adversary with respect to those very same claims. FSLIC's statutorily mandated role is to exercise all powers, including the prosecution and defense of legal disputes, in the best interest of FirstSouth.[37] In its role as litigant, FSLIC notified Coit, on or about October 9, 1987, of acceleration and foreclosure on real property under mortgage to FirstSouth. (*See* P.A. 18-19; B.A. 16-26). While actual foreclosure proceedings are temporarily in abeyance, FSLIC can reinstitute them at any time during its review of Coit's claims. (B.A. 36). Thus, even while using *Hudspeth* as a shield, FSLIC is free to pursue debts allegedly owed by Coit to FirstSouth. It is not consistent with due process to require Coit to present its claims to a tribunal that has the power to foreclose on Coit's property and to seek damages from Coit for indebtedness which Coit contends is not owed.[38] Any proceeding in which a litigant is required to submit its claim to a tribunal which is a potential adverse

employers of due process because the "trustees have a natural inclination and may even consider it a duty to maximize the fund by extracting as much money as possible from withdrawing employers." 787 F.2d at 138. FSLIC has an even more pressing need to deny creditor claims because it is a competing claimant for the same assets.

[37] *See* 12 U.S.C. §§ 1464(d)(6)(C), 1729(b)(1)(A), 1729(c)(3)(B); *see also* 12 C.F.R. §§ 548.2(a), (b).

[38] The unfairness of requiring Coit to submit its claims to FSLIC is underscored by the fact that one of Coit's claims is for a declaratory judgment that the note and deed of trust forming the basis of FirstSouth's claim are void and unenforceable. (J.A. 23.) FSLIC would thus be in the position of determining the enforceability of the very agreements that it must rely on to recover against Coit. Due process clearly prohibits a tribunal from being a judge in its own case. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955).

litigant lacks even the "appearance of justice"[39] and cannot be reconciled with due process.

Furthermore, permitting FSLIC to adjudicate claims brought against an insolvent savings and loan association empowers it to enhance its adversarial position in other forums. The claims asserted offensively in this suit by Coit may also be raised by Coit as defenses to any suit by FSLIC on the indebtedness allegedly owed to FirstSouth. Under the statutory construction urged by FSLIC, FSLIC could as adjudicator in a FSLIC administrative proceeding determine Coit's claims adversely to Coit, and then attempt to collaterally estop Coit from raising its defenses in a subsequent suit in state or federal court on the notes.[40] This clearly violates the principle of *Lavoie*, which holds that a tribunal whose decisions can be used to enhance its own position as a party in a related lawsuit cannot possibly be deemed impartial.[41] 106 S. Ct. at 1587.

[39] *In re Murchison*, 349 U.S. 133, (1955) (*quoting Offutt v. United States*, 348 U.S. 11, 14 (1954)) ("to perform its high function in the best way 'justice must satisfy the appearance of justice' ").

[40] Furthermore, the regulations governing FSLIC contain no reference whatsoever to the procedural safeguards that ensure fairness of outcome. For example, the regulations make no provisions for a hearing on validity of claims, for an opportunity to present evidence, or for oral argument. This lack of procedural safeguards magnifies the unfairness of FSLIC's proposed scheme.

[41] It is submitted that the Fifth Circuit's reliance on *Woods v. FHLBB*, 826 F.2d 1400, (5th Cir. 1987), *cert. denied* 99 L. Ed.2d 422 (1988) in deciding this case was misplaced. *Coit*, 829 F.2d at 565. In *Woods*, the appellant claimed that an evidentiary hearing was required before or immediately after FSLIC seized the assets of an allegedly insolvent savings and loan because, under *Fuentes v. Shevin*, 407 U.S. 67 (1972), property should not be subject to seizure without a proper hearing. 826 F.2d at 1410. The claim was denied because the appellant was an entity regulated by FSLIC and therefore had impliedly consented to the summary procedures which FSLIC was authorized to employ. *Id.* at 1411-13.

IV. Requiring Coit to Submit its Claims Against First-South to FSLIC for Adjudication Would Deprive Coit of its Seventh Amendment Right to a Jury Trial.

The Fifth Circuit's position also violates Petitioner's right to a trial by jury as guaranteed by the Seventh Amendment to the U.S. Constitution. This Court has held that the Seventh Amendment applies to claims for damages (like Petitioner's herein) which are based upon statutes and the common law. *Curtis v. Loether*, 415 U.S. 189, 194 (1974).

Although this Court has created limited exceptions to the right to jury trial, those exceptions do not apply here. One exception is for claims involving "public rights," defined as rights "arising between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," generally including such areas as taxation, commerce, and immigration. *Marathon*, 458 U.S. at 67-68, 70. The right to jury trial remains inviolate, however, as to "[w]holly private tort, contract, and property cases" such as Petitioner's claims. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 458 (1977).

Another exception is for actions "against the United States." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). In determining whether a lawsuit is against the United States, this Court has held that substance, not form, controls: "The

---

Here the challenge is that FSLIC is not and cannot be impartial because it is a creditor of the failed savings and loan and therefore competing for the same assets as Coit. Obviously, Coit never impliedly consented to have its common law claims decided by a competing creditor or by a self-interested tribunal and is not a regulated entity subject to FSLIC's regulatory authority. Moreover, the due process argument in this case concerns the absence of an impartial tribunal. As such, it is governed by the standards set forth in *Ward* and *Tumey*, not by *Fuentes v. Shevin*. *Woods* is therefore no precedent whatever for the due process argument in this case.

identity of the named parties defendant is not controlling; the dispositive inquiry is, 'who will pay the judgment?' " *Stafford v. Briggs*, 444 U.S. 527, 542 and n. 10 (1980). The "most availing inquiry" in determining whether a suit has been brought against the United States is whether "the judgment sought would expend itself on the public treasury or domain .... Where recovery can be had from funds in the possession and control of the agency and not from the United States Treasury, the United States is not involved in the suit." *FSLIC v. Williams*, 599 F. Supp. 1184, 1203 (D. Md. 1984).

Any argument that Petitioner in this lawsuit has brought an action "against the government" ignores the substance and glorifies the mere form of the suit. Petitioner brought this suit not against FSLIC for any wrongful act committed by FSLIC in its capacity as insurer or receiver, but against FirstSouth. Petitioner here asserts legal rights based on a dispute between Petitioner and FirstSouth, a private entity, which rights vested *independently of and prior to* FSLIC's assumption of receivership power over FirstSouth. Petitioner faces FSLIC as a defendant solely because FSLIC substituted itself in the lawsuit in place of FirstSouth. Unlike suits "against the government," this suit will not result in any recovery from funds of the United States Treasury. Until such time as the receivership assets of FirstSouth are distributed, Petitioner will recover, if at all, from those receivership assets. Even after FirstSouth's assets are distributed, however, a judgment may be awarded against the insurance funds in FSLIC's possession and control without affecting funds in the public treasury. *FSLIC v. Williams*, 599 F. Supp. at 1203-04. Because Petitioner's suit is not against the government, Petitioner is entitled to a jury trial.

However, even if Coit's suit became a suit against the Government when FSLIC was appointed receiver for First-South, such appointment could not deprive Coit of its vested

right to trial by jury. It cannot be disputed that Coit would have been entitled to a jury trial on its claims against FirstSouth if FirstSouth had not been placed in receivership. Under the circumstances, Congress cannot indirectly deprive Coit of its right to jury trial by enacting a receivership statute any more than it could pass a statute that directly repealed Coit's right to jury trial. It is elementary that Congress cannot avoid the requirements of the Constitution by doing indirectly that which it may not do directly. *Anderson v. Martin*, 375 U.S. 399, 404 (1964). Congress may not therefore abridge Coit's vested right to a jury trial by replacing Coit's private defendant with FSLIC, and then granting FSLIC the exclusive power to adjudicate those claims.

CONCLUSION

For all of these reasons, Coit respectfully requests that the Fifth Circuit's judgment affirming the district court's dismissal of Coit's action be reversed and the action be remanded to district court for trial on the merits.

Respectfully submitted,

ROBERT E. GOODFRIEND
Counsel of Record
PAUL E. GALVIN
JEFFREY C. GLASS
THOMAS J. OWENS
AKIN GUMP STRAUSS
HAUER & FELD
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75201-4618
(214) 969-2800

ATTORNEYS FOR PETITIONER

May 5, 1988

APPENDIX

(For Office Use Only)

Claim No.: _____

Received: _____

Receipt Acknowledged:
By: /s/Elisha A. Bixby
Printed Name
Title: Asst Claims Coordinator
Date: 9/28/87

IN RE
FIRSTSOUTH, F.A.
PINE BLUFF, ARKANSAS
(The "Association")

PROOF OF CLAIM

I. **Claimant's Name: COIT INDEPENDENCE JOINT VENTURE AND MAX WILLIAMS, INDIVIDUALLY**, ("claimant"). Please fill out either subparagraph (a), (b), or (c). Fill out subparagraph (d) only if claimant is a partnership or a corporation, or if claimant is an individual who is claiming through an agent.

A. (INDIVIDUAL) The claimant has the following address **5950 Berkshire Lane, Suite 300, Dallas, TX 75225**, has the following Social Security number **458-58-1883**, and can be contacted by phone during normal business hours at **(214) 891-3300**.

B. (PARTNERSHIP) The claimant is a (general/limited) partnership organized under the laws of the State of **Texas**, has the following tax identification number **75-1905213**, and has the following mailing address **16800 Dallas Parkway, Suite 210, Dallas, TX 75248**.

C. (CORPORATION) The claimant is a corporation organized under the laws of the State of _____, has the following tax identification number _____, and has the following mailing address _____.

D. (Fill out in addition to (a), (b), or (c) above if the claim is by an agent.) The undersigned, whose mailing address is **Paul E. Galvin, Akin, Gump, Strauss, Hauer & Feld, 4100 First City Center, Dallas, TX 75201** is the **attorney of record** (describe nature of agency) of claimant, is authorized to make this proof of claim on behalf of the claimant, and can be contacted by phone during normal business hours at **(214) 969-2859**.

II. **Amount of Claim**. (State amount you are claiming) **$See attached, approximately $113 million**. This amount is claimed as a (check one) X General Unsecured Claim; ____ Secured Claim (See Paragraph 7); ____ Priority Claim (See Paragraph 8).

III. **Relief Other Than Monetary Claim**. (If claimant is seeking relief other than a monetary claim). The nature of the relief sought is as follows: **Declaratory judgment that FirstSouth, F.A., alternatively, is a general partner or co-venturer of Claimant as described in attached Plaintiff's Original Petition.**

IV. **Written Evidence of Claim or Basis for Relief**. (If claim or basis for relief is founded on writing). The writing on which this claim is founded or on which relief is being sought (or duplicate thereof) is attached hereto (or cannot be attached for the reason set forth in a statement attached hereto). **See attached petition and answer to number 5.**

V. **Judicial Proceedings**. (If legal proceedings have been filed or a judgment has been rendered on the claim or on the relief being sought.) A copy of the complaint or court order and other relevant materials are attached hereto showing the name of the case, the parties to the case, the court, the docket number, the date of judgment, if applicable, the name of the judge, and whether an appeal has been sought. **See attached.**

VI. **Credits.** The claimant certifies that the claim asserted herein does not include any amounts for which payment, part payment or other valuable consideration has been received.

VII. **Security Interest.** The following is a description of any security held for this claim **N/A**. The undersigned claims the security interest under the writing referred to in paragraph 4 hereof (or under a separate writing which is attached hereto or under a separate writing which cannot be attached hereto for the reason set forth in a statement attached hereto.) Evidence of perfection of such security interest, if any, is also attached hereto.

VIII. **Preference or Priority**. The undersigned hereby asserts the following preference or priority: **N/A**. (Please describe nature of priority claimed by reference to the List of Priorities attached hereto or available from the Receiver).

The undersigned hereby certifies that the information contained in this Proof of Claim Form, including the additional pages and statements attached hereto, is true and correct, and that all copies of documents submitted with this Proof of Claim Form are true and correct copies of the originals.

Date of Signature: 9/28/87 /s/ Paul Galvin
Signature

Name (please print): Paul E. Galvin

THE PENALTY FOR MAKING ANY STATEMENT KNOWN TO BE FALSE FOR THE PURPOSE OF INFLUENCING IN ANY WAY THE ACTION OF THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IS A FINE OF NOT MORE THAN $5,000.00 OR IMPRISONMENT FOR NOT MORE THAN TWO YEARS, OR BOTH (18 U.S.C. 1008).

THIS PROOF OF CLAIM MUST BE SUBMITTED TO AND RECEIVED BY THE RECEIVER ON OR BEFORE SEPTEMBER 28, 1987. FAILURE TO FILE A COMPLETED PROOF OF CLAIM BY SUCH BAR DATE WILL RESULT IN A DISALLOWANCE OF YOUR CLAIM. SUBMIT COMPLETED PROOF OF CLAIM FORMS TO:

The Federal Savings and Loan Insurance Corporation
As Receiver for FirstSouth, F.A.
1349 Empire Central, Suite 600
Dallas, Texas 75247
Attention: Claims Coordinator

SEE PREFERENCE OR PRIORITY (NO. 8)

SECURED CLAIMS

A. An allowed claim of a creditor secured by a lien on property of the Association or in which the Association has an interest is secured to the extent of the value of the property or the interest securing such claim, and is unsecured to the extent that such value is less than the amount of the allowed claim;

B. The secured claim of a secured creditor, if accepted as valid by the Receiver, shall be allowed, not to exceed the amount of the principal obligation, contractually determined interest to the date of payment, and any allowed prepayment penalty or fee;

C. A claim to security shall be recognized by the Receiver to the extent that, under the laws of the State of Arkansas, such creditor claim is secured by, or constitutes a lien on, assets or property of any kind of the Association or in which the Association has an interest;

D. Allowance of contractually determined interest may include, to the extent provided for by written contract, interest on ordinary contractual interest chargeable in the event of a failure to pay principal or interest when due;

E. The Receiver shall allow a claim for prepayment penalty or fee, if and only if, made pursuant to a written contract that provides for a prepayment penalty or fee, *provided*, however, that such prepayment penalty or fee allowed by the Receiver shall not exceed the present value of the loss attributable to the difference between the contract rate of the secured borrowing and the reinvestment rate available to the lender, and shall not be charged or used as a penalty for default; and

F. The Receiver may recover from property securing an allowed secured claim the reasonable necessary costs and expenses of preserving or disposing of such property to the extent of any benefit to the holder of such claim;

UNSECURED CLAIMS, PRIORITIES

G. Unsecured claims against the receivership estate of the Association that are proved to the satisfaction of the Receiver shall have priority in the following order:

a. Administrative expenses of the Receiver, including the costs, expenses, and debts of the Receiver;

b. Administrative expenses of the Association, provided that such expenses were incurred within thirty (30) days prior to the Receiver's taking possession, and that such expenses shall be limited to reasonable expenses incurred for services actually provided by accountants, attorneys, appraisers, or examiners, or incurred by employees which were authorized and reimbursable under a pre-existing expense reimbursement policy, that, in the opinion of the Receiver, are of benefit to the receivership, and shall not include wages or salaries of employees of the Association;

c. Administrative expenses of the Association for wages and salaries (including vacation, sick leave pay, and contributions to employee benefit plans) earned prior to appointment of the Receiver by an employee of the Association whom the Receiver determines it is in the best interests of the receivership to engage as an employee of the Association in receivership for a reasonable period of time;

d. Claims for wages and salaries (including vested vacation, sick leave pay, and contributions to employee

benefit plans) earned prior to the appointment of the Receiver, up to a maximum of three thousand dollars ($3,000) per person, by an employee of the Association whom the Receiver determines should not be engaged as an employee of the Association in receivership for a reasonable period of time;

e. Claims of governmental units for unpaid taxes, but no other claim of a governmental unit shall have a priority higher than that of the sixth category below;

f. Claims for withdrawable accounts, including those of the FSLIC as subrogee or transferee, and all other claims, whether liquidated or unliquidated, which have accrued and become unconditionally fixed on or before the date of default, except as provided in succeeding paragraphs of this section;

g. Claims other than those that have accrued and become unconditionally fixed on or before the date of default, including claims for interest after the date of default on claims of the sixth category, *provided* that any claim based on an agreement for accelerated, stipulated, or liquidated damages, which claim did not accrue prior to the date of default, shall be considered as not having accrued and become unconditionally fixed on or before the date of default;

h. Claims that have been subordinated in whole or in part to general creditor claims, which shall be given the priority specified in the written instruments that evidence such claims;

i. Claims by holders of nonwithdrawable accounts, including stock, which shall have priority within this ninth category in accordance with terms of the written instruments that evidence such claims; and

H. Interest after the date of default on claims of the sixth category in (g) above shall be at a rate or rates adjusted monthly to reflect the average rate for U. S. Treasury bills with maturities of not more than ninety-one (91) days during the preceding three (3) months; and

I. All unsecured claims of any category of priority described in (g)(1) through (g)(9) above shall be paid in full, or provision made for such payment, before any claims of lesser priority are paid; if there are insufficient funds to pay any claim or claims of one priority in full, distribution to claimants in such class shall be made pro rata; and notwithstanding anything to the contrary herein, the Receiver may at any time, and from time to time, prior to the payment in full of all claims of a class with higher priority, make distributions to claimants in priority classes (g)(1), g(2), (g)(3), (g)(4), (g)(5), and (g)(6) as the Receiver believes are reasonably necessary to conduct the receivership, *provided* that the Receiver determines that adequate funds exist or will be recovered during the receivership to pay in full all claims of any higher priority.

CLAIMANT COIT INDEPENDENCE JOINT VENTURE SUBMITS THIS PROOF OF CLAIM UNDER PROTEST AND WITHOUT WAIVING ITS RIGHTS TO HAVE THIS CASE TRIED BEFORE A JURY IN FEDERAL DISTRICT COURT IN THE EVENT THAT ITS APPEAL IS SUCCESSFUL. CLAIMANT COIT INDEPENDENCE JOINT VENTURE DOES NOT WAIVE ANY OF ITS RIGHTS BY THE SUBMISSION OF THIS PROOF OF CLAIM. CLAIMANT FURTHER DEMANDS THAT IT BE AFFORDED THE OPPORTUNITY TO CONDUCT DISCOVERY, SUBPOENA WITNESSES, PUT ON LIVE TESTIMONY, AND BE HEARD AT ANY HEARINGS WITH RESPECT TO THIS CLAIM.

2. Amount of Claim (state amount you are claiming) $37,296,332.00 with respect to the Rasor Tract Loan and $76,512,960 respecting the Frankford Property Loan described in Plaintiff's Original Petition attached hereto. The amount claimed on the Rasor Tract Loan is computed as follows: Loan amount $20,669,336.00 minus 310,000.00 (commitment fee) leaves a true principal amount of $20,359,336. The maximum amount of interest which could have been charged on this sum at eighteen percent (18%) interest for the 72 days between June 1, 1983 and August 12, 1983 is $722,895. The amount which Coit was actually charged equals $23,434,319 ($20,669,336 + 549,006 interest + 2,215,977 profit participation which in effect is interest). Accordingly the interest charged is $3,074,983 which is in excess of twice the amount of $722,895.00 which lawfully could have been charged. The usurious interest charged is $2,352,088.00 which when multiplied times three, the statutory damages under Article 5069-1.06 Tex. Rev. Civ. Stat. Ann., equals $7,056,264.00. That amount added to the forfeiture of the principal of $20,669,336.00, the statutory damages under Article 5069-1.06 Tex. Rev. Civ. Stat. Ann., equals $27,725,600.00 due as of August 12, 1983. Claimant is additionally entitled to a common law recovery of the usurious interest charged or received in the amount of $2,352,088. Prejudgment interest on the amount of $30,077,688 at six percent (6%) per year to August 12, 1987, equals $6,654,144.00, for a total damage claim on the Rasor Tract Loan as described in Plaintiff's Original Petition in the amount of $37,296,332.00. Alternatively, if the $310,000.00 commitment fee is not subtracted to arrive at a true principal loan amount, the interest charged still is in excess of twice the amount allowed by law and the damages claimed would be $35,704,138.00.

The amount of $76,512,960 claimed on the Frankford Property Loan secured by a deed of trust on the Frankford

Property as described in Plaintiff's Original Petition is computed as follows: Loan Amount of $30,000,000 minus $450,000 in fees leaves a true principal amount of $29,550,000. The maximum amount of interest which could have been charged or contracted for on this sum at eighteen percent (18%) interest for one year is $5,319,000. The amount which First-South contracted for or charged for one year equals $13,245,000 ($3,495,000 charged as interest plus $9,750,000 contracted for by FirstSouth in the form of a 25% profit participation. This sum is arrived at by multiplying 25% times the fair market value of the Frankford Property of $39,000,000 at the time of the making of the loan.) Accordingly, the interest contracted for or charged is $13,245,000 which is in excess of twice the amount of $5,319,000 which lawfully could have been charged or contracted for. The usurious interest contracted for and charged is $7,926,000 which when multiplied times three, the statutory damages under Article 5069-1.06, equals $23,778,000. That amount added to the forfeiture of the principal amount of the loan of $30,000.000, the damages under Article 5069-1.06 Tex. Rev. Civ. Stat. Ann., equals $53,778,000 due as of August 13, 1983. Claimant is additionally entitled to a common law recovery of the usurious interest charged or contracted for in the amount of $7,926,000.00. Prejudgment interest on the amount of $61,704,000 at six percent (6%) per year to August 12, 1987, equals $14,808,960, for a total damage claim on the Frankford Property Loan as described in Plaintiff's Original Petition in the amount of $76,512,960.

5. Attached hereto with respect to judicial proceedings filed on the claim are the following: Plaintiff's Original Petition, Defendant's Answer, Defendant's Petition for Removal, Order dismissing the case, Notice of Appeal filed by claimant, and the style of the case presently pending in the Fifth Circuit. Claimant has filed its brief in the Fifth Circuit and

has also filed a Petition for Initial Hearing en banc in the Fifth Circuit. As of this date, the Fifth Circuit has not acted on the Petition for Initial Hearing en banc nor has it decided the appeal of Claimant. Claimant additionally relies on documents in the custody or control of FSLIC or FirstSouth which have not been obtained by Claimant due to the absence of discovery in the judicial proceeding. The claim of Max Williams, individually, is based on his status as a guarantor of the Frankford Property Loan and extension thereof described in Plaintiff's Original Petition and evidenced by a Guaranty dated August 12, 1983, and by subsequent guaranties, copies of which are attached hereto.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

P.O. Box 64976
Chicago, IL 60664
Creditor Claims Department

Receiver For:
FirstSouth, F.A.

COIT INDEPENDENCE
JOINT VENTURE AND
MAX WILLIAMS
C/O AKIN, GUMP,
STRAUSS, et.al.
4100 FIRST CITY CENTER
1700 PACIFIC AV.
DALLAS, TX 75201-4618

Date of Notice: Mar 18 1988
Claim Number: 3-0620-1579

ATTN: PAUL E. GALVIN, ESQ.

NOTICE OF RETENTION OF CLAIM FOR FURTHER REVIEW

The Federal Savings and Loan Insurance Corporation, as Receiver for FirstSouth, F.A., Little Rock, Arkansas ("Receiver"), hereby notifies you that your Proof of Claim in the amount shown below and received by the Receiver on the date shown below has been retained for further review:

CLAIMANT: **COIT INDEPENDENCE JOINT VENTURE AND MAX WILLIAMS**

AMOUNT OF CLAIM: **APPROX. $113 MILLION**
DATE CLAIM RECEIVED: **09/28/87**

The Receiver will review your claim and notify you of its determination upon the completion of its review. During its review, the Receiver may request additional information or

materials relating to your claim. Please include your Claim No. referenced above on any future correspondence and direct any questions to the Receiver at the following address:

The Federal Savings and
Loan Insurance Corporation
as Receiver for
FirstSouth, F.A.
PO Box 64976
Chicago Illinois 60664
Attn: Claims Department

THE FEDERAL SAVINGS
AND LOAN INSURANCE
CORPORATION AS
RECEIVER FOR
FirstSouth, F.A.
Little Rock, Arkansas

BY: /s/ Hyacinth G. Meeks
Hyacinth G. Meeks
Regional Claims
Manager

CONTACT PERSON: Hyacinth G. Meeks
(312) 853-2210

CE''TIFICATE OF SERVICE BY MAIL

The undersi[illegible]d hereby certifies that a copy of the foregoing NOTICE OI[illegible]ETENTION was sent by certified and regular mail, postage pre-paid on *Mar 18 1988* to the following:

COIT INDEPENDENCE
JOINT VENTURE
AND MAX WILLIAMS
C/O AKIN, GUMP,
STRAUSS, et.al.
4100 FIRST CITY CENTER
1700 PACIFIC AV.
DALLAS, TX 75201-4618

ATTN: PAUL E. GALVIN, ESQ.

/s/ Hyacinth G. Meeks
Hyacinth G. Meeks
Regional Claims Manager

ANDREWS & KURTH
Coit/Independence Project
Attorneys
4400 Thanksgiving Tower
Dallas, Texas 75201
(214) 979-4400
Telex 70-9669
Telecopier (214) 969-9334

Texas Commerce Tower
Suite 700
Washington, D.C. 20004
(202) 662-2700

1730 Pennsylvania
Avenue, N.W.
Suite 700
Washington, D.C. 20004
(202) 662-2700

October 9, 1987

Certified Mail No.
P-498 070 244
Return Receipt Requested

Coit Independence Joint Venture
16800 Dallas Parkway,
Suite 210
Dallas, Texas 75248

Attention: David L. Gray

Certified Mail No.
P-498 070 246
Return Receipt Requested

Mr. A. Starke Taylor, Jr.
Coit Independence Joint Venture
Dallas, Texas 75248

Certified Mail No.
P-498 070 247
Return Receip' Requested

Mr. Charles C. Taylor
Coit Independence Joint
Venture
16800 Dallas Parkway,
Suite 210
Dallas, Texas 75248

Certified Mail No.
P-498 070 247
Return Receipt Requested

Mr. David L. Gray
Coit Independence Joint
Venture
16800 Dallas Parkway,
Suite 210
Dallas, Texas 75248

Re: Notice of Acceleration and Foreclosure

Dear Sir:

Please be advised that because of the unpaid indebtedness referenced in the attached Notice of Sale by Substitute Trustee by which Joseph M. Osborne, Substitute Trustee acting at the direction and request of the Federal Savings And Loan Insurance Corporation, as Receiver for FirstSouth, F.A. (the "Receiver") gives notice of sale at foreclosure of the property therein described, and because of the currently existing default in regard thereto, all of said indebtedness has been and hereby is accelerated. In addition, foreclosure of all property described therein will be made in accordance with the terms of said notice unless payment in full of the described indebtedness is made prior to the foreclosure date. Please note that said foreclosure will occur on the first Tuesday of the next month, same being November 3, 1987 between the hours of 10:00 a.m. and 4:00 p.m. at the steps of the Collin County Courthouse in McKinney, Texas.

Enclosed are the Federal Home Loan Bank Board's Procedures for the Administration and Determination of Requests for Expedited Relief from Decisions or Threatened Actions of the FSLIC as Receiver. Any questions regarding the Bank Boards procedures should be directed to the Federal Home

Loan Bank Board, Adjudication Division, 1700 G. Street, N.W. Washington, D.C. 20552; (202)377-7399.

Very truly yours,

/s/ JOSEPH M. OSBORNE
Joseph M. Osborne

Enclosures

cc: Donna R. Harrigan
Special Representative for FSLIC
as Receiver for FirstSouth, F.A.
1600 FirstSouth Building
Little Rock, AR 72201

James P. Cooke, Esq.
Hopkins & Sutter
545 East John Carpenter Freeway
Irving, TX 75062

Steven D. Chantelois,
Federal Asset Disposition Association
5080 Spectrum Drive
Suite 1100 E
Dallas, TX 75248

Home Federal Savings and Loan
100 South Main
Mountain Home, AR 72653

Attention: Eddie King

Coit/Independence Project

NOTICE OF SALE BY SUBSTITUTE TRUSTEE

THE STATE OF TEXAS
COUNTY OF COLLIN
} KNOW ALL PERSONS BY THESE PRESENTS:

THAT, WHEREAS, Graylor Investments, Inc. ("Original Borrower"), became indebted to FirstSouth Federal Savings and Loan Association ("Lender"), as evidenced by (i) that certain Promissory Note, dated August 12, 1983, in the original principal sum of Thirty Million and No/100 Dollars ($30,000,000.00), executed and delivered by Original Borrower to the order of Lender, as payee, bearing interest and being due and payable as therein provided, said Note and all liens securing same have been assigned to Coit Independence Joint Venture ("Borrower") by assignment dated August 12, 1983, said assignment having been recorded in Volume 1715, Page 41 in the Official Public Records of Real Property of Collin County, Texas; (ii) that certain promissory note dated November 30, 1984, in the original principal sum of Three Million and No/100 Dollars ($3,000,000.00), executed and delivered by Borrower to the order of Lender, as payee, bearing interest and being due and payable as therein provided; and (iii) that certain promissory note dated November 7, 1985 in the original principal sum of Four Million Six Hundred Thousand and No/100 Dollars ($4,600,000.00), executed and delivered by Borrower to the order of Lender, as payee, bearing interest and being due and payable as therein provided (collectively, the "Notes"); and

WHEREAS, the indebtedness evidenced by the Notes (the "Indebtedness") is secured by, among other items, (i) that certain Deed of Trust (the "First Deed of Trust") dated August 12, 1983, executed by Original Borrower, to E. Harley

Cox, Jr., Trustee for the benefit of Lender, said First Deed of Trust being filed for record and recorded in the Official Public Records of Real Property of Collin County, Texas in Volume 1715, Page 24, (ii) that certain Deed of Trust (the "Second Deed of Trust") dated November 30, 1984, executed by Borrower, to E. Harley Cox, Jr., Trustee for the benefit of Lender, said Second Deed of Trust being filed for record and recorded in the Official Public Records of Real Property of Collin County, Texas in Volume 2033, Page 464, (iii) that certain Deed of Trust (the "Third Deed of Trust") dated November 7, 1985, executed by Borrower, to E. Harley Cox, Jr., Trustee for the benefit of Lender, said Third Deed of Trust being filed for record and recorded in the Official Public Records of Real Property of Collin County, Texas in Volume 2252, Page 749; (iv) that certain Extension Agreement dated August 12, 1984 between Borrower and Lender recorded in Volume 2009, Page 214 of the Official Public Records of Real Property of Collin County, Texas; (v) that certain Extension Agreement dated November 1, 1984 between Borrower and lender recorded in Volume 2033, Page 462 of the Official Public Records of Real Property of Collin County, Texas; (vi) that certain Extension Agreement dated August 19, 1985 between Borrower and Lender recorded in Volume 2199, Page 70 of the Official Public Records of Real Property of Collin County, Texas; (vii) that certain Extension Agreement dated August 19, 1985 between Borrower and lender recorded in Volume 2199, Page 72 of the Official Public Records of Real Property of Collin County, Texas; (collectively, the "Collateral Documents") covering property described in Exhibit "A" and "B" hereto, along with all appurtenances, improvements, fixtures and personal property of any kind located thereon or pertaining thereto, leases and rents relating hereto as more fully described therein (all of which is hereinafter referred to as the "Premises"); and

WHEREAS, the Notes and the Collateral Documents and all other documents securing the Note are now held by the Federal Savings and Loan Insurance Corporation, acting in its limited capacity as Receiver for FirstSouth, F.A. ("Beneficiary"); and

WHEREAS, to the full extent the Collateral Documents or any other security agreement held by Beneficiary covers both real and personal property, any of said personal property which is part of the Premises or which is otherwise covered by a lien or security interest in favor of Beneficiary will be hereinafter included in the definition of Premises as used herein and sold at public sale, hereinafter described, pursuant to Section 9.501(d) of the Texas Uniform Commercial Code; and

WHEREAS, there may be certain leases, rental agreements, easements and/or other matters (collectively, the "Other matters") covering and/or affecting the Premises currently in existence; and

WHEREAS, the liens securing the payment of the Indebtedness may be senior and superior to one or more of the Other Matters and junior and inferior to other of the Other Matters; and

WHEREAS, with respect to the liens securing the payment of the Indebtedness, which are senior to the Other Matters, if any, Beneficiary may subordinate its liens securing the Indebtedness to any one or more of the Other Matters and may not so subordinate such liens to other of the Other Matters; and

WHEREAS, in the event Beneficiary chooses to subordinate its liens securing the Indebtedness to any Other Matters, such decision will be announced at the foreclosure sale; and

WHEREAS, default has been made in the payment of the Notes and the Indebtedness, and the Notes are now unpaid, delinquent and in default; and

WHEREAS, Beneficiary has given all required notices to Borrower with regard to the defaulted Indebtedness; and

WHEREAS, pursuant to the authority granted in the First Deed of Trust, the Second Deed of Trust and the Third Deed of Trust (collectively, the "Deeds of Trust"), Beneficiary has appointed the undersigned as Substitute Trustee under the Deeds of Trust pursuant to a duly authorized and executed appointment document; and

WHEREAS, Beneficiary has requested the undersigned to enforce the liens of the Deeds of Trust by sale of the Premises in the manner set forth under the terms of the Deeds of Trust and pursuant to the laws of the State of Texas; and

WHEREAS, the undersigned, Substitute Trustee, acting upon the request of said Beneficiary, by these presents is hereby posting, filing and giving notice of the foreclosure of the Deeds of Trust and the lien thereof in accordance with applicable Texas law and the terms and provisions of the Deed of Trust; and

NOW, THEREFORE, I, the undersigned, Joseph M. Osborne, Substitute Trustee as aforesaid, do hereby give notice that after due publication of this notice as required by law and the Deeds of Trust, I will sell the Premises at public vendue to the highest bidder or bidders, for cash, between the hours of 10:00 a.m. and 4:00 p.m. on the first Tuesday in November next, the same being November 3, 1987 at the courthouse door in McKinney, Collin County, Texas, where foreclosure sales are customarily held in such county.

EXECUTED this *9th* day of October, 1987.

/s/ JOSEPH M. OSBORNE
Joseph M. Osborne,
Substitute Trustee

THE STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned authority, on this day personally appeared *Joseph M. Osborne*, Substitute Trustee, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that (s)he executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this *9th* day of October, 1987.

/s/ NANCY RICCA RILEY
Notary Public in and for TEXAS

(SEAL)

Printed Name of Notary:

My Commission Expires:
7/5/89

EXHIBIT "A"

Being a tract or parcel of land situated in the City of Dallas, Collin County, Texas, and being part of the John Clay Survey, Abstract No. 223, and else being part of 313.78 acre tract of land conveyed to Texas Research Foundation by deed recorded in Volume 464, Page 376, of the Deed Record of Collin County, Texas; and being more particularly described as follows:

BEGINNING at a point for corner at the intersection of the Northwesterly line of the St. Louis and Southwestern Bell Railroad right of way (100 feet wide) and the Westerly line of FM 3193 (130 feet wide);

THENCE, South 75 degrees 09 minutes 35 seconds West along the Northwesterly line of said railroad right of way a distance of 164.29 feet to a point for corner in the Westerly line of said Clay Survey;

THENCE, North 0 degrees 46 minutes East along the Westerly line of said Clay survey and the Westerly line of said Texas Research Foundation tract a distance of 1894.02 feet to a point for corner in the centerline of Renner Road;

THENCE, South 88 degrees 48 minutes East along the centerline of Renner Road and the Northerly line of said Clay Survey a distance of 147.97 feet to a point for corner in the Westerly line of FM 3193;

THENCE, South 0 degrees 26 minutes 55 seconds West along the Westerly line of FM 3193 a distance of 1848.73 feet to the place of beginning and containing 6.5798 acres (286,614 square feet) of land.

EXHIBIT "B"

BEING a tract of land in the City of Renner and being out of the Collin County School Land Survey, abstract No. 169, Collin County, Texas, and also being part of the land conveyed by Claude R. McClennahan, Jr., Trustee, to Wm. K. Campbell, Jr., Coit Road Limited Partnership by deed recorded July 27, 1970, in Volume 762, Page 153 of the Collin County Deed Records and being more particularly described as follows:

BEGINNING at a found iron rod on the South right-of-way line of Frankford Road (Renner Road) (60 feet wide), said point being 30.0 feet South 01 degrees 01 minutes 00 seconds West from the Northeast corner of the 97.5 acre tract conveyed by Abe M. Cain and wife, to J.W. Williams, et. al., by deed dated November 10, 1934, in Volume 297, Page 59 Collin County Deed Records;

THENCE South 01 degrees 01 minutes 00 seconds West, departing said South line and along the dividing line between the East line of said Williams tract and the West line of the tract conveyed to Texas Research Foundation by deed in Volume 464, Page 376 Collin County Deed Records, a distance of 1863.9 feet to a found fence post for a corner on the Northwesterly line of the right-of-way of the St. Louis & Southwestern Railway, (100 feet wide);

THENCE South 75 degrees 30 minutes 00 seconds West, along said Railway right-of-way line, being 50.0 feet perpendicularly distant Northwesterly of and parallel with the center line of the track thereon, a distance of 915.0 feet to a found iron rod for a corner, said iron rod being the most easterly corner of the 5.0-acre tract conveyed by Tom Campbell to Ples Reader, Inc., by deed dated November 14, 1969, in Volume 745, Page 634 Collin county Deed Records;

THENCE North 14 degrees 30 minutes 00 seconds West, departing and perpendicular to said right-of-way, along the easterly line of said Reader tract, a distance of 231.95 feet to a found iron rod for a corner;

THENCE South 75 degrees 30 minutes 00 seconds West, parallel with said right-of-way, along the Northerly line of said Reeder tract, a distance of 1031.2 feet to a bois d'arc post for a corner on the east line of the lot described as:

> "Lot on North side of St. Louis & Southwestern Railway in the West line of the Nick Pierce School Land.
> Beginning at a stake, on point where line crosses right of
> Thence East, with right of way, 50 feet;
> Thence North to center of branch;
> Thence with branch West to the center of dividing line;
> Thence South to right of way, the place of beginning";

in deed from J. F. Dickerson to F. W. Jackson, filed February 27, 1908, in Volume 149, Pages 562-563, Collin County Deed Records;

THENCE North 00 degrees 47 minutes 00 seconds West, parallel with Dickerson Street, a distance of 52.64 feet to a point for a corner in said branch, said point being the Northeast corner of said Jackson tract;

THENCE South 89 degrees 13 minutes 00 seconds West, along the center of said branch and the North line of said Jackson tract, a distance of 48.57 feet to a point for a corner on the East line of Dickerson Street;

THENCE North 00 degrees 47 minutes 00 seconds West, along the East line of Dickerson Street, being 30.0 feet East of and parallel with its center line, a distance of 165.0 feet to an angle point in said line, said angle point being a set iron rod;

THENCE North 01 degrees 37 minutes 00 seconds East, along the East line of Dickerson Street, being 30.0 feet East of and parallel with its center line, a distance of 1834.37 feet to a set iron rod being the beginning of a curve at the intersection of Dickerson Street with Frankford Road;

THENCE along said curve to the right, having a central angle of 89 degrees 06 minutes 00 seconds and a radius of 102.06 feet, an are distance of 158.71 feet, said are having a chord which bears North 46 degrees 10 minutes 00 seconds East, 143.20 feet, to the end of said curve on the South line of Frankford Road, said end of curve being a set iron rod;

THENCE South 89 degrees 17 minutes 00 seconds East, along the South line of Frankford Road, being 30.0 feet South of and parallel with its center line, a distance of 1872.05 feet to the POINT OF BEGINNING AND CONTAINING 3,969,627 square feet or 91.130 acres of land more or less.

RE: COIT INDEPENDENCE JOINT VENTURE } REQUEST FOR EXPEDITED RELIEF
Claim No. 3-0620-1579

Coit Independence Joint Venture, Claimant under Claim No. 3-0620-1579, hereby submits this its Request for Expedited Relief by reason of the threatened action of a Notice of Foreclosure, a copy of which is attached hereto as Exhibit "A," and requests that the Federal Home Loan Bank Board ("Bank Board") intercede on Claimant's behalf to instruct the Receiver to refrain from proceeding with the foreclosure sale scheduled for November 3, 1987. Claimant makes this request under protest and without waiving any of its rights to proceed in a court of competent jurisdiction to restrain the Receiver from proceeding with the foreclosure in the event of an adverse determination by the Bank Board.

Claimant's Request for Expedited Relief is based on the following:

I.

Coit Independence Joint Venture ("Coit" or "Claimant") filed a lawsuit against FirstSouth, F.A. alleging claims of usury and seeking a declaratory judgment that FirstSouth and Claimant were in fact partners with respect to the land transaction described in the Plaintiff's Original Petition. As shown by the Proof of Claim, a copy of which is attached hereto as Exhibit "B," Coit claims damages in excess of $113 million against FirstSouth by reason of the usurious loans entered into by FirstSouth. The lawsuit against FirstSouth was dismissed by the court pursuant to *Hudspeth* after FSLIC took over FirstSouth. Coit's case has been appealed to the Fifth Circuit Court of Appeals and a Petition for Initial Hearing en banc has been filed by Coit. Although filed by Coit in July of 1987, the Fifth Circuit has still not acted on Coit's for Initial Hearing en banc nor has the Fifth Circuit

ruled on Coit's appeal. Further, beginning in August, 1986, Coit's representatives attempted to negotiate with FirstSouth a workout of the loans which are presently posted for foreclosure. Coit received no response from FirstSouth. After FSLIC took over FirstSouth, Coit's representatives have attempted to work through and with the Federal Asset Disposition Association ("FADA") through its representative, Mr. Paul Harris, to negotiate a workout of the subject loans. Coit has made an offer to Mr. Harris which Mr. Harris has indicated to Coit may be accepted by FSLIC and the Bank Board as a method to renegotiate and work out the subject loans. Those conversations with Mr. Harris took place as recently as September and early October, 1987. Mr. Harris has not indicated to Coit's representatives when FSLIC will consider the offer or when it will make a counteroffer, but he has indicated to representatives of Coit that the normal procedure would take at least two months and possibly as many as four months. However, despite the ongoing negotiations FSLIC has posted the subject loans for foreclosure on November 3, 1987. It is highly improbable, given the bureaucratic nature and work load of FSLIC and FADA, that FSLIC, the Bank Board, or FADA will be able to consider, accept, or counteroffer the offer made by Coit before November 3, 1987. Accordingly, by reason of the fact that the amount of Coit's claims against FirstSouth are far in excess of the claims made by FirstSouth against Coit, by reason of the ongoing negotiations between Coit and Mr. Paul Harris of FADA, and by reason of the pendency of the appeal and by reason of the fact that FirstSouth's assets and FSLIC's assets may not be adequate to support a judgment by Coit against FirstSouth and FSLIC, Coit respectfully requests the Bank Board to instruct the Receiver not to foreclose on the subject property on November 3, 1987.

II.

The relevant case law on which Coit relies for this Request is the case of *Guardian Savings & Loan Association v. Williams*, 731 S.W.2d 107 (Tex. App. — Houston [1st Dist.] 1987) and the cases cited therein. A copy of the *Williams* case is attached hereto as Exhibit "C" and incorporated herein by reference.

III.

The relevant documentation in support of Coit's request is in part attached to the Proof of Claim. Due to the ambiguous phrasing of the Bank Board procedures which require all "relevant documentation" to be submitted, Coit has not submitted every document that it would introduce in trial hereof but will be willing to supply further documentation at the request of the Bank Board. Coit also submits the Affidavit of Charles C. Taylor, Exhibit "D," and reincorporates the usury calculations made in the Proof of Claim attached hereto.

IV.

Coit's assessment of the likelihood of success on the merits of the underlying claim is that Coit has an excellent chance of prevailing on the underlying claim. For example, the claim based on the Rasor Tract loan as described in Plaintiff's petition was a no risk situation for FirstSouth. After FirstSouth became aware that Coit had a contract to sell the property at a substantial profit within a short period of time FirstSouth insisted on the 25% profit participation interest. There were no services rendered by FirstSouth in connection with the loan and there can be no other conclusion but that the profit participation contracted for, charged, and received

by FirstSouth was compensation for the loaning of funds to Coit, which is defined as interest under Texas law. Under the usury calculations set forth in the Proof of Claim, on the Rasor Tract loan itself, Coit would be entitled to damages against FirstSouth in excess of $35 million.

V.

The probable imminent and irreparable harm likely to be suffered by Coit in the event the expedited relief is not granted will be that a foreclosure sale of the property will deprive Coit of its equity in the property, will deprive it of its ability to develop and utilize the unique property, will deprive Coit of its right to sell or mortgage the property at some time in the future, and will deprive Coit of the full benefit of the value of the property. Further, as shown by the Affidavit of Charles C. Taylor, attached hereto, the foreclosure sale would adversely affect credit ratings of the partners of Coit, would ruin the reputation of the Coit partners as developers, and may prevent the Coit partners from further borrowing money at other financial institutions in the United States. Due to the unique nature of real estate in general and this property in particular (*see Greater Bank v. Conte*, 641 S.W.2d 407, Tex. App. — Houston [14th Dist.] 1982, no writ), the damages suffered by Coit would not be monetarily compensable.

VI.

I hereby certify that Donna R. Harrigan, Special Representative, Federal Savings and Loan Insurance Corporation as Receiver for FirstSouth Federal Savings & Loan Association, 111 Center Street, Little Rock, Arkansas 72201-2413, has received a copy of Coit's Request for Expedited Relief.

Respectfully submitted,

/s/ PAUL GALVIN
Paul E. Galvin

Of AKIN, GUMP, STRAUSS,
HAUER & FELD
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75301-4618
Telephone: (214) 969-2800

Attorney for Claimant
Coit Independence Joint
Venture

BEFORE THE DIRECTOR
OFFICE OF FEDERAL SAVINGS & LOAN
INSURANCE CORPORATION
FEDERAL HOME LOAN BANK BOARD

COIT INDEPENDENCE JOINT VENTURE,
Petitioner
v.
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR FIRSTSOUTH, F.A.
Respondent

DOCKET NO. 87-157
REQUEST FOR EXPEDITED RELIEF

OCTOBER 27, 1987

RESPONDENT'S MOTION TO DISMISS

The Federal Savings and Loan Insurance Corporation ("FSLIC"), as Receiver for FirstSouth, F.A. ("Respondent"), by and through its attorneys, Hopkins & Sutter, moves to dismiss the Request for Expedited Relief ("Request") filed on behalf of Coit Independence Joint Venture ("Petitioner") seeking expedited relief from threatened action of the Respondent set forth in a notice of acceleration and foreclosure from counsel to Respondent dated October 9, 1987, and in support of its Motion states:

1. On December 4, 1986, the Federal Home Loan Bank Board ("Bank Board") appointed the FSLIC as sole receiver of FirstSouth, F.A., at which time the Respondent succeeded to all rights formerly held by FirstSouth, F.A. under the loan which is the subject of the Request.

2. Petitioner filed its Request with the Bank Board and served a copy of the same on Respondent on October 21, 1987.

3. Petitioner's Request seeks intervention by the Bank Board on Petitioner's behalf to "instruct [Respondent] to refrain from proceeding with the foreclosure sale scheduled for November 3, 1987." Petitioner seeks no other relief in its Request.

4. Respondent, for reasons unrelated to the grounds for relief raised in the Request, has notified Petitioner by letter dated October 26, 1987 that Respondent will not proceed with the foreclosure sale scheduled for November 3, 1987. A copy of the letter so notifying Petitioner is attached hereto as Exhibit "A". Thus, the threatened action of Respondent, which is the subject of the Request, is no longer threatened and will not occur, if at all, without further notification to Petitioner of a subsequent foreclosure sale (the next permissible date of which is December 8, 1987).

5. Due to the withdrawal of Respondent's notice of foreclosure sale, the Respondent's right to foreclose its lien is now merely an inchoate right to seek foreclosure at a later date and the Request is, therefore, premature. See *Harold and Betty Rice, et. al.*, FHLBB Docket No. 87-062 (July 8, 1987) (slip op. at 2).

WHEREFORE, Respondent respectfully moves that its Motion to Dismiss Petitioner's Request be granted because the threatened foreclosure by Respondent, which is the subject of the Request, has been withdrawn and the Request, therefore, is premature.

Respectfully submitted,

By: /s/ James P. Cooke
James P. Cooke
Michael B. Solow
HOPKINS & SUTTER
545 E. Carpenter Freeway
Suite 1000
Dallas, Texas 75062
(214) 830-6020

Attorneys for the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, as Receiver for FirstSouth, F.A.

CERTIFICATE OF SERVICE

I, James P. Cooke, hereby certify that a copy of the foregoing document was placed in the United States mail in Dallas, Texas, first class postage prepaid and addressed to Petitioner, c/o Petitioner's attorney, on this 27th day of October, 1987.

/s/ JAMES P. COOKE
James P. Cooke

ANDREWS & KURTH
Attorneys
4400 Thanksgiving Tower
Dallas, Texas 75201
(214) 979-4400
Telex 70-9669
Telecopier (214) 969-9334

Texas Commerce Tower
Suite 700
Washington, D.C. 20004
(202) 662-2700

1730 Pennsylvania Avenue, N.W.
Suite 700
Washington, D.C. 20004
(202) 662-2700

October 26, 1987

Coit Independence Joint Venture
16800 Dallas Parkway, Suite 210
Dallas, Texas 75248

Mr. A. Starke Taylor, Jr.
Coit Independence Joint Venture
16800 Dallas Parkway, Suite 210
Dallas, Texas 75248

Attention: David L. Gray

Mr. Charles C. Taylor
Coit Independence Joint Venture
16800 Dallas Parkway, Suite 210
Dallas, Texas 75248

Mr. David L. Gray
Coit Independence Joint Venture
16800 Dallas Parkway, Suite 210
Dallas, Texas 75248

Re: (a) Promissory Note dated August 12, 1983, in the principal sum of $30,000,000, executed by Coit Independence Joint Venture, payable to FirstSouth F.A. (as extended; (b) Promissory Note dated September 23,

1983, in the principal amount of $3,000,000, executed by Coit Independence Joint Venture and payable to the order of FirstSouth, F.A. (as extended); and (c) Promissory Note dated November 7, 1985, in the principal amount of $4,600,000, executed by Coit Independence Joint Venture, payable to the order of FirstSouth, F.A. (as extended).

Gentlemen:

This letter will evidence my instructions from the Federal Savings and Loan Insurance Corporation acting in its limited capacity as Receiver for FirstSouth, F.A. (the "FSLIC") not to foreclose the liens securing the above referenced loans on Tuesday, November 3, 1987, provided however, that the FSLIC reserves the right to repost the property for foreclosure.

Nothing contained herein shall be deemed to be a waiver of any event of default or other provision of any promissory notes or loan documents evidencing the above referenced loans, nor shall this letter be construed to be a reinstatement of the indebtedness under such loans.

Very truly yours,

/s/ JOSEPH M. OSBORNE
Joseph M. Osborne
Substitute Trustee

cc: Donna R. Harrigan
Special Representative for FSLIC
as Receiver for FirstSouth, F.A.
1600 First South Building
Little Rock, Arkansas 72201

Steven D. Chantelois
FADA
5080 Spectrum Drive
Suite 1100E
Dallas, Texas 72653

Home Federal Savings and Loan
100 South Main
Mountain Home, Arkansas 72653

Attention: Eddie King

Hand Delivered
James P. Cooke, Esq.
Hopkins & Sutter
545 East John Carpenter Frwy
Irving, Texas 75062

FEDERAL HOME LOAN BANK BOARD
WASHINGTON, D.C.

COIT INDEPENDENCE JOINT VENTURE,
Petitioner

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR FIRSTSOUTH, F.A.
Respondent

Docket No. 87-157
Request for Expedited Relief

October 30, 1987

ORDER OF DISMISSAL

On October 21, 1987, Coit Independence Joint Venture [Petitioner] filed a Request for Expedited Relief from a notice of foreclosure dated October 9, 1987, and served on petitioner by the Federal Savings and Loan Insurance Corporation as Receiver for FirstSouth, F.A. (Little Rock, Arkansas) [Respondent]. The foreclosure was scheduled for November 3, 1987.

On October 28, 1987, the Federal Home Loan Bank Board received a letter from the Respondent, dated October 27, 1987, stating that the Respondent "for reasons unrelated to the grounds for relief raised in the Request, has notified Petitioner by letter dated October 26, 1987 that Respondent will not proceed with the foreclosure sale scheduled for November 3, 1987." (Letter at 3.)

Accordingly, the Request for Expedited Relief filed by Coit Independence Joint Venture on October 21, 1987, is hereby DISMISSED WITHOUT PREJUDICE.

By the Federal Home Loan Bank Board,

/s/ JUDITH L. FRIEDMAN
Judith L. Friedman
Associate General Counsel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *ORDER OF DISMISSAL* in FHLBB Docket No. 87-157 was sent by DHL Worldwide Express on October 30, 1987, to the following:

Paul E. Galvin, Esquire
Akin, Gump, Strauss, Hauer & Feld
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75301-4618

Bruce R. Coulombe, Esquire
Andrews & Kurth
4200 Texas Commerce Tower
Houston, Texas 77002

Donna Harrigan
Special Representative
Federal Savings and Loan Insurance Corporation as Receiver for FirstSouth, F.A.
111 Center Street
Little Rock, Arkansas 72601

/s/ JUNE O. STEWART
June O. Stewart
Paralegal
Adjudication Division

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article III, Section 1 of the United States Constitution provides:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

12 U.S.C. § 1464(d)(6)(C) of the Home Owners Loan Act of 1933 provides:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the [Federal Home Loan Bank] Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

12 U.S.C. § 1728(c) of the National Housing Act provides:

> No action against the [Federal Savings and Loan Insurance] Corporation to enforce a claim for payment of insurance upon an insured account of an insured institution in default shall be brought after the expiration of three years from the date of default unless, within such three-year period, the conservator, receiver, or other legal custodian of the insured institution shall have recognized such insured account as a valid claim against the insured institution and the claim for payment of insurance shall have been presented to the Corporation and its validity denied, in which event the action may be brought within two years from the date of such denial.

12 U.S.C. § 1729(c) and (d) of the National Housing Act provide:

> Powers of Corporation and Federal Home Loan Bank Board on Default of other institutions
>
> (c)(1) In the event any insured institution other than a Federal savings and loan association is in default, the Corporation shall have authority to act as conservator, receiver, or other legal custodian of such insured institution, and the services of the Corporation are tendered to the court or other public authority having the power of appointment. If the Corporation is so appointed, it shall

> have the same powers and duties with respect to the insured institution in default as are conferred upon it under subsection (b) of this section with respect to Federal savings and loan associations. If the Corporation is not so appointed it shall pay the insurance as provided in section 1728 of this title, and shall have power (1) to bid for the assets of the insured institution in default, (2) to negotiate for the merger of the insured institution or the transfer of its assets, or (3) to make any other disposition of the matter as it may deem in the best interests of all concerned.
>
> (2) In the event of the Federal Home Loan Bank Board determines —
>
> (A) that (i) a conservator, receiver, or other legal custodian (whether or not the Corporation) has been or is hereafter appointed for an insured institution which is not a Federal savings and loan association other than by the Board (whether or not such institution is in default) and that the appointment of such conservator, receiver, or custodian, or any combination thereof, has been outstanding for a period of at least fifteen consecutive days, or (ii) an insured institution (other than a Federal savings and loan association) has been closed by or under the laws of any State;
>
> (B) that one or more of the grounds specified in paragraph (6)(A) of section 1464(d) of this title, existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, or exists thereafter during the appointment of the conservator, receiver, or other legal custodian or while the institution is closed; and

(C) that one or more of the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole receiver for such institution. As used in this paragraph (2), the term "State" includes the Commonwealth of Puerto Rico, the territories and possessions, and any place subject to the jurisdiction of the United States.

(3) In any case where the Corporation is appointed receiver of an insured institution pursuant to paragraph (2) —

(A) the provisions of section 1464(d) of this title shall be applicable in the same manner and to the same extent as if such institution were a Federal savings and loan association with respect to the Corporation had been appointed receiver under paragraph (6) thereof, and the provisions of paragraph (14) of said subsection (d) shall be applicable in the same manner and the same extent that they would be applicable if the insured institution were an institution referred to in the first sentence of said paragraph; and

(B) the Corporation shall have authority to liquidate such institution in an orderly manner or to make such other disposition of the matter as it deems to be in the best interests of the institution, its savers, and the Corporation.

In connection with the liquidation of any such institution, the language "the court or other public authority having jurisdiction over the matter" in subsection (d) this section shall mean the Board.

Additional Powers of Corporation

(d) In connection with the liquidation of insured institutions in default, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the court or other public authority having jurisdiction over the matter.

12 U.S.C. § 1730(k)(1) of the National Housing Act provides:

Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court of the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any

court of any State or of the United States or any territory, or any other court.

Section 549.4 of the Federal Home Loan Bank Board Regulations provides, in relevant part:

(b) The receiver shall allow any claim seasonably received and proved to its satisfaction. The receiver may wholly or partly disallow any creditor claim or claim of security, preference, or priority not so proved, and shall notify the claimant of the disallowance and the reason therefor. Mailing notice of the disallowance to the claimant's last address appearing on the association's books or on the proof of claim shall be sufficient notice. Unless, within 30 days after notice is mailed, the claimant files a written request for payment regardless of the disallowance, disallowance shall be final, except as the Board may otherwise determine.

Section 569a.8 of the Federal Home Loan Bank Board Regulations provides, in relevant part:

(b) any claim filed on or before the date fixed pursuant to paragraph (a) of the section and proved to the satisfaction of the Receiver shall be allowed by the Receiver. The Receiver may disallow in whole or in part any creditor claim or claims of security, or priority not proved to its satisfaction, and notice of such disallowance or rejection together with the reason therefor shall be served by the Receiver upon the claimant by certified mail. The mailing of notice of such disallowance or rejection to the last known address of any claimant appearing on the books or the proof of claim shall be deemed sufficient for the purposes hereof.